88-7081

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

NO. 88-____

RECEIVED
APR 24 1989
OFFICE OF THE CLERK
SUPREME COURT, U.S.

LEROY MCNEIL,
Petitioner,

v.

STATE OF NORTH CAROLINA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

RECEIVED
APR 24 1989
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Gordon Widenhouse
Assistant Appellate Defender

Office of the Appellate Defender
Post Office Box 1070
Raleigh, North Carolina 27602
(919) 733-9490

COUNSEL OF RECORD

QUESTIONS PRESENTED

I. DO INSTRUCTIONS IMPOSING A DUTY ON THE JURY TO RETURN SENTENCES OF DEATH CREATE A MANDATORY CAPITAL SENTENCING PROCEDURE THAT UNCONSTITUTIONALLY LIMITS DISCRETION BY PREVENTING THE JURY FROM MAKING A REASONED MORAL JUDGMENT AS TO PUNISHMENT BASED UPON PETITIONER'S CHARACTER AND CIRCUMSTANCES NOT DENOMINATED AS MITIGATING?

II. DO INSTRUCTIONS PROHIBITING THE JURY FROM GIVING CONSIDERATION, AS MITIGATING EVIDENCE, TO PETITIONER'S ALLOCUTORY EXPRESSIONS OF SORROW AND REMORSE PREVENT THE CAPITAL SENTENCER FROM WEIGHING AN IMPORTANT ASPECT OF HIS CHARACTER IN VIOLATION OF THE EIGHTH AMENDMENT?

III. DOES NORTH CAROLINA'S CAPITAL SENTENCING PROCEDURE, WHICH EXPLICITLY PRECLUDES JURORS FROM CONSIDERING MITIGATING EVIDENCE UNLESS ALL TWELVE JURORS UNANIMOUSLY FIND IT TO MAKE OUT A MITIGATING CIRCUMSTANCE, VIOLATE THIS COURT'S HOLDING IN MILLS V. MARYLAND, 486 U.S. 1988?

TABLE OF CONTENTS

QUESTIONS PRESENTED ..... *i*

TABLE OF CONTENTS ..... *ii*

TABLE OF AUTHORITIES ..... *iii*

OPINION BELOW 1

JURISDICTION 2

CONSTITUTIONAL AMENDMENTS AND STATUTES INVOLVED 2

STATEMENT OF THE CASE 3

A. Proceedings Below 3

B. Factual Background 3

REASONS FOR GRANTING THE WRIT 4

ARGUMENT:

I. THE TRIAL COURT'S INSTRUCTION THAT THE JURY HAD A "DUTY" TO IMPOSE SENTENCES OF DEATH CREATED A MANDATORY CAPITAL SENTENCING PROCESS IN VIOLATION OF THE EIGHTH AMENDMENTS REQUIREMENT OF INDIVIDUALIZED PUNISHMENT BASED UPON THE CHARACTER AND CIRCUMSTANCES OF EACH DEFENDANT 4

II. THE INSTRUCTIONS PROHIBITING THE JURY FROM GIVING CONSIDERATION, AS MITIGATING EVIDENCE, PETITIONER'S ALLOCUTORY EXPRESSIONS OF SORROW AND REMORSE PREVENTED THE CAPITAL SENTENCE FROM WEIGHING AN IMPORTANT ASPECT OF HIS CHARACTER IN VIOLATION OF THE EIGHTH AMENDMENT 8

III. THE PROCEDURE EXPLICITLY PRECLUDING JURORS FROM CONSIDERING MITIGATING EVIDENCE NOT FOUND TO MAKE OUT A MITIGATING CIRCUMSTANCE UNANIMOUSLY BY ALL TWELVE JURORS VIOLATES MILLS V. MARYLAND, 486 U.S. ___ (1988) 11

CONCLUSION 14

TABLE OF CASES AND AUTHORITIES

CASES:

Bassett v. Commonwealth,
222 Va. 844, 284 S.E.2d 844 (1981) *cert. denied*, 456
U.S. 938 (1982) 10

Blystone v. Pennsylvania,
___ U.S. ___ (No. 88-6222, 27 March 1989) 5,7

Booth v. Maryland,
482 U.S. ___, 96 L.Ed.2d 440 (1987) 10

Booth v. State,
306 Md. 172, 507 A.2d 1098 (1986), *rev'd on other*
grounds, Booth v. Maryland, 482 U.S. ___ (1987) 10

Chambers v. Mississippi,
410 U.S. 284, 302 (1973) 9

Eddings v. Oklahoma,
455 U.S. 104 (1982) 9

Franklyn v. Lynaugh,
487 U.S. ___, 101 L.Ed.2d 155 (1988) 5,11

Gardner v. Florida,
430 U.S. 349 (1979) 7

Green v. Georgia,
442 U.S. 95 (1979) (*per curiam*) 9

Gregg v. Georgia,
428 U.S. 153 (1976) 7

Harris v. State,
306 Md. 344, 509 A.2d 120 (1986) 10

Lloyd v. North Carolina,
U.S. ___, No. 88-6833 (3 October 1988), *prior decision adhered to*,
323 N.C. 622, 374 S.E.2d 277 (1988) 12

Lockett v. Ohio,
438 U.S. 586 (1978) 5

McKoy v. North Carolina,
489 U.S. ___ (*cert. granted*, 21 February 1989) 11

Mills v. Maryland,
486 U.S. ___, 100 L.Ed.2d 384 (1988) 11

(CASES CONT.)

Mullaney v. Wilbur,
421 U.S. 684 (1975) 3

Roberts v. Louisiana,
428 U.S. 325 (1976) 7

Skipper v. South Carolina,
476 U.S. 1 (1986) 11

Smith v. North Carolina,
459 U.S. 1056 (1982) 5

Stanford v. Kentucky,
___ U.S. ___ (No. 87-5765, 1988) 8

State v. Allen,
323 N.C. 208, 372 S.E.2d 855 (1988) 12

State v. Kirkley,
308 N.C. 196, 302 S.E.2d 144 (1983) 13

State v. Mack,
105 Wash.2d 692, 718 P.2d 407 (1986) 10

State v. McDougall,
308 N.C. 1, 301 S.E.2d 308 (1983) 12

State v. McNeil,
324 N.C. 33, 375 S.E.2d 909 (1989) 3

State v. Wood,
648 P.2d 71 (Utah 1982) 5

State v. Zola,
112 N.J. 384, 548 A.2d 1022 (1988) 10

Wilkens v. Missouri,
___ U.S. ___ (No. 87-6026, 1988) 8

Woodson v. North Carolina,
428 U.S. 280 (1976) 7

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const., amend. VIII 2

U.S. Const., amend. XIV 2

42 Pa. Cons. Stat. §9711 8

N.C. Gen. Stat. 15A-2000(b) 2

N.C. Gen. Stat. §15A-2000 8,12

N.C. Gen. Stat. §15A-2002 5

MISCELLANEOUS

Sullivan, *The Capital Defendant's Right to Make a Personal Plea For Mercy: Common Law Allocution and Constitutional Mitigation*, 15 New Mex. L. Rev. 41 (1985) 10

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

NO. 88- ____

***

JURISDICTION

The judgment of the Supreme Court of North Carolina affirming Petitioner's conviction and sentence was entered on 1 March 1989.[1] Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3) (1982).

CONSTITUTIONAL AMENDMENTS AND STATUTES INVOLVED

U.S. Const., amend. VIII: Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const., amend. XIV: No state shall . . . deprive any person of life, liberty, or property, without due process of law. . . .

N.C. Gen. Stat. 15A-2000(b):[2] . . . After hearing the evidence, argument of counsel, and instructions of the court, the jury shall deliberate and render a sentence recommendation to the court, based upon the following factors: (1) Whether any sufficient aggravating circumstance or circumstances as enumerated in subsection (e) exists; (2) Whether any sufficient mitigating circumstance or circumstances as enumerated in subsection (f), which outweigh the aggravating circumstance or circumstances found, exist; and (3) Based on these considerations, whether the defendant should be sentenced to death or to imprisonment in the State's prison for life.

The sentence recommendation must be agreed upon by a unanimous vote of the 12 jurors. . . .

---

[1]The opinion of the Supreme Court of North Carolina was filed on 9 February 1989. The actual judgment of the Supreme Court of North Carolina is entered in the docket by the clerk twenty (20) days after the date of the filing of the opinion. N.C. R. App. 32(b). This provision is reproduced in Appendix B.

[2]This statute is reproduced in Appendix C.

STATEMENT OF THE CASE

A. Proceedings Below

A jury convicted defendant of two counts of first-degree murder and, after a sentencing proceeding, found various aggravating and mitigating circumstances, considered the unspecified mitigating circumstances insufficient to outweigh the aggravating circumstances, and concluded the aggravating circumstances were sufficiently substantial to warrant the imposition of the death penalty. It recommended two sentences of death. The Supreme Court of North Carolina affirmed. *State v. McNeil,* 324 N.C. 33, 375 S.E.2d 909 (1989).

Each of the three questions presented here were raised on direct appeal to the Supreme Court of North Carolina on federal constitutional grounds. The court rejected each claim on the merits. Thus, each federal claim was properly raised below and is appropriate for this Court's review. *E.g., Mullaney v. Wilbur,* 421 U.S. 684 (1975).

B. Factual Background

Petitioner and his wife, Penny McNeil, saw Elizabeth Stallings walking in the rain as they were driving toward the downtown area. They offered her a ride, which she accepted. They took her to the post office so she could obtain food stamps. Afterwards, they went to the vacant house to obtain some cocaine.

Penny McNeil, testifying under a plea agreement, said that after she went into the house, petitioner and Stallings came in behind her. Suddenly, he grabbed Stallings and forced her into a closet. He began choking Stallings and she soon lost consciousness.

As Stallings was rendered unconscious, petitioner instructed Penny McNeil to go next door and get his rifle. She brought it to him and he shot Stallings. They eventually sold the food stamps.

Two days later, petitioner and Penny McNeil drove their car to Deborah Fore's apartment. The three drove toward a nightclub. Apparently, Fore thought they were

taking her to the store. When they arrived at the club, it was closed. As they were driving up the road away from the club, petitioner stopped the car. According to Penny McNeil, he opened the trunk of the car. Fore got out of the car and talked to petitioner for about five minutes. One of the tires began losing air and he became very upset. According to Penny McNeil, as Fore was getting back into the car, he shot her. In his confession, petitioner admitted that he "just shot" Fore. He pulled her body to the side of the road and removed her keys from her pocket. She had been shot once in the head and died of that gunshot wound.

Using Fore's keys, petitioner and Penny McNeil went into her apartment. They took her pocketbook, rings, and a television.

One of the items obtained from Fore's purse was a bank card. When use of the card was attempted, it proved unsuccessful. The card was eventually retrieved from the machine.

During cross-examination, Penny McNeil admitted petitioner never discussed with her what he intended to do with Stallings or Fore. He never threatened Stallings while he was choking her. He never expressed an intention of killing Fore and did not tell Fore that he was going to kill her at any point. She acknowledged he was very mad and upset when the tire went flat.

REASONS FOR GRANTING THE WRIT

I. THE TRIAL COURT'S INSTRUCTION THAT THE JURY HAD A "DUTY" TO IMPOSE SENTENCES OF DEATH CREATED A MANDATORY CAPITAL SENTENCING PROCESS IN VIOLATION OF THE EIGHTH AMENDMENT'S REQUIREMENT OF INDIVIDUALIZED PUNISHMENT BASED UPON THE CHARACTER AND CIRCUMSTANCES OF EACH DEFENDANT.

Pursuant to North Carolina's statutory scheme and pattern jury instructions, the trial court told petitioner's sentencing jury "it would be your duty to recommend that the defendant be sentenced to death" if it found the aggravating circumstances found by the jury sufficiently substantial to call for the imposition of the death penalty when

considered with any mitigating circumstances found by the jury. (Tpp. 468, 470)[3] Under this duty instruction, the jury had no discretion with respect to its recommendations. The instructions forced mandatory recommendations of death. The jury's recommendations were binding on the trial court, which imposed the death sentences. N.C. Gen. Stat. §15A-2002.[4]

These instructions exceeded a proper channeling of juror discretion. *See Franklin v. Lynaugh*, 487 U.S. ___, 101 L.Ed.2d 155 (1988). Instead, they created a sentencing process in which the sentencer had "no vehicle for expressing its 'reasoned moral response' to" the entire situation before it. *Id.* at 101, L.Ed.2d at 172 (O'Conner, J., concurring). The challenged instructions deprived the jury of the opportunity to decide, in its ultimate sentencing decision, not merely that the aggravating factors in tandem with the mitigating factors warranted a sentence of death, but also "that the imposition of the death penalty [was] justified and appropriate in the circumstances." *State v. Wood*, 648 P.2d 71, 83 (Utah 1982) *quoted in Smith v. North Carolina*, 459 U.S. 1056 (1982) (Stevens, J., respecting the denial of certiorari). Justice Stevens noted the prevailing ambiguity in such instructions and the lurking constitutional infirmity in light of *Lockett v. Ohio*, 438 U.S. 586 (1978). *Id.* Indeed, this Court has recently agreed to review the Pennsylvania capital sentencing procedure, under which "the verdict must be a sentence of death" if the jury finds that the existing aggravating factors outweigh the existing mitigating factors.[5] *Blystone v. Pennsylvania*, (No. 88-6222, 27 March 1989)

---

[3]References to the transcript below are designated "Tp. ___." The trial court's instructions to the sentencing jury are included in Appendix D.

[4]Section 15A-20002 provides:

> If the recommendation of the jury is that the defendant be sentenced to death, the judge shall impose a sentence of death in accordance with the provisions of Chapter 15, Article 19 of the General Statutes. If the recommendation of the jury is that the defendant be imprisoned for life in the State's prison, the judge shall impose a sentence of imprisonment for life in the State's prison.

N.C. Gen. Stat. §15A-2002.

[5]*See* 42 Pa. Cons. Stat. §9711(c)(iv).

15. Criminal Law ⇐728(2)

Prosecutor's addressing each woman on jury by name, and then speaking to them collectively regarding how they would have felt begging for their life had they been in the place of the defendant's murder victims, done during closing arguments in sentencing phase of prosecution for first-degree murder, was not so grosaly improper as to require ex mero motu intervention by trial court.

16. Criminal Law ⇐728(2)

Prosecutor's statement to jury in closing argument of sentencing phase of first-degree murder prosecution that jury should be a voice for the community, was not so grosaly improper as to require ex mero motu intervention by trial court; prosecutor did not go outside record and appeal to jury to convict defendant because other murderers had killed other victims, nor did he encourage jury to base its determination on public sentiment, but rather reminded jurors that they must decide case on evidence and the law.

17. Criminal Law ⇐728(2)

Prosecutor's statements to jury in closing argument of sentencing phase of first-degree murder prosecution, that jurors should set standard for their community regarding imposition of death penalty, that defendant had joined ranks of infamous murderers, and that defendant, not jury, would be responsible for his execution if death penalty were given, were not so grosaly improper as to require trial court to intervene ex mero motu.

18. Criminal Law ⇐1038.1(3)

Defendant's failure to object to jury instruction on aggravating circumstances resulted in defendant having to establish on appeal that court committed plain error in giving instruction.

19. Criminal Law ⇐1038.1(3)

Instruction on aggravating circumstances that defendant's previous conviction for voluntary manslaughter was a crime involving use of violence to the person was not plain error, inasmuch as voluntary manslaughter almost always involved violence to the person, and defendant did not offer evidence that prior conviction did not involve use of violence to the person.

20. Homicide ⇐325

Instruction in sentencing phase of prosecution of two counts of first-degree murder that if aggravating circumstance of a previous violent felony applied at all, it would apply to both offenses, was not plain error since evidence supporting aggravating circumstance was identical as to both counts.

21. Homicide ⇐311

Submission of aggravating circumstance that murder was especially heinous, atrocious or cruel was proper where evidence showed that defendant not only choked and shot victim, but that he beat her, stabbed her, and hit her in the face with a wooden frame which had nails sticking out of it, and that defendant pushed feces into victim's vagina. G.S. § 15A-2000(e)(9).

22. Homicide ⇐311

Submission of aggravating circumstance that each of two murders was committed while defendant was engaged in the commission of a robbery was proper, since defendant was convicted of first-degree murder based on both premeditation and deliberation and the felony-murder rule, and both theories were supported by the evidence. G.S. § 15A-2000(e)(5).

23. Assault and Battery ⇐56

Rifle and pistol are deadly weapons as a matter of law.

24. Homicide ⇐357(5, 11)

Sentences of death for two convictions of first-degree murder were not disproportionate or excessive, insofar as evidence showed that both murders were premeditated, one murder was especially heinous, and defendant had previously been convicted of a felony involving the use of violence to the person.

Appeal by defendant pursuant to N.C. G.S. § 7A-27(a) from judgments imposing death sentences entered by Brewer, Jr., J., at the 30 April 1984 Criminal Session of

Superior Court, Wake County. Heard in the Supreme Court 9 May 1988; additional arguments heard 22 August 1988.

Lacy H. Thornburg, Atty. Gen. by Ellen B. Scouten, Asst. Atty. Gen., Raleigh, for state (original brief and argument).

Lacy H. Thornburg, Atty. Gen., James J. Coman, Sr. Deputy Atty. Gen., William N. Farrell, Jr., Sp. Deputy Atty. Gen., Joan H. Byers, Sp. Deputy Atty. Gen., Barry S. McNeill, Asst. Atty. Gen., and Ellen B. Scouten, Asst. Atty. Gen., Raleigh, for state (supplemental brief and argument).

Malcolm Ray Hunter, Jr., Appellate Defender by Gordon Widenhouse, Asst. Appellate Defender, Raleigh, for defendant-appellant (original brief and argument).

Malcolm Ray Hunter, Jr., Appellate Defender, Louis D. Bilionis, Asst. Appellate Defender, and Gordon Widenhouse, Asst. Appellate Defender, Raleigh, for defendant-appellant (supplemental brief and argument).

E. Ann Christian and Robert E. Zaytoun, Raleigh, for North Carolina Academy of Trial Lawyers, amicus curiae.

John A. Dusenbury, Jr., Asheville, for North Carolina Ass'n of Black Lawyers, amicus curiae.

WHICHARD, Justice.

Defendant was convicted of two counts of first degree murder on the basis of premeditation and deliberation and under the felony murder rule. The court submitted and the jury found three aggravating circumstances in the murder of Elizabeth Stallings: defendant previously had been convicted of a felony involving the use of violence to the person, the murder took place during the commission of robbery with a firearm, and the murder was especially heinous, atrocious or cruel. The court submitted and the jury found two aggravating circumstances in the murder of Deborah Fore: defendant previously had been convicted of a felony involving the use of violence to the person, and the murder took place during the commission of robbery with a firearm. In both cases, the court submitted the following possible mitigating circumstances: defendant has no significant history of prior criminal activity; defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired; defendant confessed to the crime shortly after the crimes were committed; defendant has an I.Q. of seventy-eight and is borderline mentally retarded; defendant had been a good and useful employee of Rea Construction Company prior to the events of April 1983; and any other circumstance or circumstances arising from the evidence which the jury deems to have mitigating value. The jury found one or more of those mitigating circumstances, without specifying which ones. Upon the jury's recommendation, the trial court sentenced defendant to death in both cases. We find no error.

The evidence presented by the State tended to show that on 8 April 1983 defendant and Penny Faye McNeil[1] had been drinking alcoholic beverages and discussing their need for money to pay rent. They went out driving around Raleigh. While driving, defendant saw Elizabeth Stallings, whom neither he nor Ms. McNeil knew, walking down the street. Defendant asked her if she wanted a ride. She got in the car and told defendant that she was going to the post office to get food stamps. Defendant drove her there and told her he would wait for her. After Ms. Stallings got out of the car, defendant told Ms. McNeil that he was going to rob Ms. Stallings. When Ms. Stallings came back out, defendant convinced her to go with them to have a beer and get some cocaine.

Defendant drove to a vacant house next door to his home. Defendant, Ms. McNeil, and Ms. Stallings went in the vacant house. Defendant grabbed Ms. Stallings around

1. In this appeal, both parties have referred to Ms. McNeil as defendant's wife. However, upon hearing a motion in limine, the trial court found that defendant's marriage to Linda Faye Harrington had not been legally dissolved when defendant purported to marry Penny Faye Pharr (McNeil) in Dillon, South Carolina in December 1982. The court concluded that defendant was not legally married to Ms. McNeil.

the neck, flipped ou
her into the bedroo
asked her for the fo
them to defendant,
Ms. McNeil. He cho
she was unconscio
Ms. McNeil to go
rifle, which she did;
leave the room. Af
she heard a shot. De
of Ms. Stallings' clo
like someone had
Defendant later sold
around $109.00. He
took from her finge

Dr. Gordon LeGr
who performed the
ings' body, testified
died as a result of th
head. He testified th
wound in her chest,
phragm, liver and st
inal wound caused, i
trauma such as the i
There were bruises
left arm, left hand,
shoulder, right butto
There was a wound
broken window fram
out was found at
LeGrand testified tha
eye could have been
the window frame.
that, in his opinion,
abdominal wound, a
the left eye were
There was fecal ma
orifice and inside the
testified that feces
the agonal phase, ju
there's any kind of
whatever, loss of cont
el." In his opinion i
probing force to inse
na.

After the murder
fendant and Ms. Mc
places and drank alc
9 April 1983, the next
of the day. On 10 A
ued to drink. Defen
that they would nee
rent because they h

the neck, flipped out a knife, and forced her into the bedroom to the closet. He asked her for the food stamps. She gave them to defendant, then he gave them to Ms. McNeil. He choked Ms. Stallings until she was unconscious. Defendant asked Ms. McNeil to go next door and get his rifle, which she did; then he told her to leave the room. After she left the room, she heard a shot. Defendant took off some of Ms. Stallings' clothes so it would look like someone had raped and robbed her. Defendant later sold the food stamps for around $109.00. He also sold a ring he took from her finger.

Dr. Gordon LeGrand, the pathologist who performed the autopsy on Ms. Stallings' body, testified that, in his opinion, she died as a result of the bullet wound to her head. He testified that she also had a stab wound in her chest, penetrating her diaphragm, liver and stomach, and an abdominal wound caused, in his opinion, by blunt trauma such as the impact of a fist or foot. There were bruises and abrasions on her left arm, left hand, left shoulder, right shoulder, right buttock, and left eyebrow. There was a wound below the left eye. A broken window frame with nails sticking out was found at the crime scene; Dr. LeGrand testified that the wound under the eye could have been caused by a blow with the window frame. Dr. LeGrand testified that, in his opinion, the stab wound, the abdominal wound, and the wounds around the left eye were premortem wounds. There was fecal matter around the anal orifice and inside the vagina. Dr. LeGrand testified that feces are "often present in the agonal phase, just prior to death, if there's any kind of struggle, or stress, or whatever, loss of continent [sic] of the bowel." In his opinion it would have taken a probing force to insert feces into the vagina.

After the murder of Ms. Stallings, defendant and Ms. McNeil went to several places and drank alcoholic beverages. On 9 April 1983, the next day, they drank most of the day. On 10 April 1983 they continued to drink. Defendant told Ms. McNeil that they would need money to pay the rent because they had "rode around and drinked up the money." Defendant said that they might get money from Deborah Fore. Defendant called Ms. Fore and talked her into going out with them.

Defendant and Ms. McNeil went to Ms. Fore's home. She went with them to a store. Defendant then drove out into the country. He stopped the car, got his pistol from under the seat, put it in his belt, and got out of the car. He told the women that they had a flat tire. Ms. Fore got out of the car. Defendant shot her in the head. He took her keys and a dollar bill, then left her body by the side of the road. Defendant and Ms. McNeil went to Ms. Fore's apartment, used her key to get inside, and stole her television, her pocketbook, and a set of rings. Defendant drove to a teller machine and tried unsuccessfully to get money with Ms. Fore's teller card. He later dropped her pocketbook into an abandoned well in his back yard and sold for $90.00 the pistol he had used to kill Ms. Fore and the rifle he had used to kill Ms. Stallings.

Defendant presented no evidence during the guilt-innocence phase of the trial. During the sentencing phase, he called two witnesses. Dr. Selwyn Rose, a psychiatrist, testified that defendant is an alcoholic, and that, prior to the time of the murders, defendant and Ms. McNeil spent most of their money drinking heavily on the weekends. Al Peace testified that defendant was a good employee who worked well with others, but that he was often late to work or absent from work, particularly on Fridays.

GUILT PHASE

Defendant first contends that the trial court erred in allowing the two murder charges to be joined for trial. He argues that the murders were not transactionally related. We disagree.

The State made a pretrial motion to consolidate for trial three first degree murder charges against defendant. The three crimes with which defendant was charged occurred within a period of eight days. The court allowed the State's motion to join

the Stallings and Fore cases, but denied the State's motion to join the third case.

The statute allowing joinder of offenses provides:

> (a) Joinder of Offenses.—Two or more offenses may be joined in one pleading or for trial when the offenses, whether felonies or misdemeanors or both, are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan.

N.C.G.S. § 15A-926(a) (1988). The decision to consolidate for trial cases having a transactional connection is within the discretion of the trial court and, absent a showing of abuse of discretion, will not be disturbed on appeal. *State v. Kornegay*, 313 N.C. 1, 23-24, 326 S.E.2d 881, 898 (1985).

[1] Defendant argues that consolidation of the two cases for trial was improper because the cases had no "transactional connection" necessary for proper joinder under N.C.G.S. § 15A-926(a). Our review of the evidence, however, shows ample support for the trial court's decision to join the two cases. The evidence showed that defendant, on the weekend of the murders, needed money to pay his rent and other bills. He apparently went out to find someone to rob on 8 April 1983. He got Ms. Stallings to ride in the car with him and Ms. McNeil, then he drove to an empty house, where he robbed and murdered her. On 10 April 1983, defendant told Ms. McNeil that they still needed money because they had spent what they had on alcohol. He apparently planned to rob Ms. Fore. He got her to ride in the car with him and Ms. McNeil. He drove out in the country, killed her, then stole several items from her apartment. These two robberies and murders were acts constituting parts of defendant's plan to obtain money for rent and other bills. He carried out his plan by getting each woman into his car, then driving to another location and killing her.

In *Kornegay*, the trial court consolidated for trial a charge of obtaining property by false pretenses, a charge of embezzlement, and a charge of malfeasance of a corporate agent. *Kornegay*, 313 N.C. at 23, 326 S.E.2d at 898. The evidence there showed that the defendant's act of obtaining funds by false pretenses from a client was part of his scheme to embezzle funds from his law firm. *Id.* at 24, 326 S.E.2d at 898. We held that the trial court did not abuse its discretion in joining the offenses because "[t]he common thread connecting the crimes is defendant's shortage of ready cash in April of 1982." *Id.* In the case before us, the "common thread" connecting the crimes was defendant's need for cash to pay his rent and other bills. This need for money motivated him to begin his search for victims and led to the eventual robberies and murders of Ms. Stallings and Ms. Fore two days apart. We hold that there is sufficient evidence of a "transactional connection" to support joinder of the offenses. Therefore, the trial court did not abuse its discretion in consolidating the two cases for trial.

Defendant next contends that the trial court erred in denying his motion to dismiss the charge of first degree murder of Ms. Fore. He argues that there was insufficient evidence to prove premeditation and deliberation.

Premeditation and deliberation are necessary elements of first degree murder. *State v. Propst*, 274 N.C. 62, 71, 161 S.E.2d 560, 567 (1968). Premeditation means that the defendant thought out the act beforehand for some length of time, however short. *State v. Jackson*, 317 N.C. 1, 23, 343 S.E.2d 814, 827 (1986), *vacated on other grounds*, 479 U.S. 1077, 107 S.Ct. 1271, 94 L.Ed.2d 133 (1987). "Deliberation means an intent to kill, carried out in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation." *Id.* The State may prove the elements of premeditation and deliberation by circumstantial evidence as well as by direct evidence. *Id.* Among the circumstances to be considered in determining whether a defendant acted after premeditation and

deliberation are the
the victim and the d
fore and after the

[2] The State's e
that defendant need
and other bills and
might have some mo
her and persuaded
and Ms. McNeil. T
and picked her up.
under the seat. Be
car, he took the pist
When Ms. Fore got
her in the head.
and money and left
the road. This ev
support a finding of
liberation. Therefo
al court did not err
motion to dismiss.

Defendant next
court erred in deny
tion potential juro
standing of the le
would serve if sen
ment for first degr
ing exchange tool
counsel attempted
from a potential ju

Q. Do you think
means an individ
the rest of his
MR. STEPHEN
tion.
COURT: Sustain
Q. Do you un
who is sentence
after being convi
der is not entitl
MR. STEPHEN
COURT: Sustain

Defendant argues
formation to exer
lenges for cause a
lenges. He argue
jurors about the p
for a defendant se
ment create an un
jury will sentence

Defendant cites
F.2d 257 (5th Cir.
argument. In *Kin*

deliberation are the want of provocation by the victim and the defendant's conduct before and after the killing. *Id.*

[2] The State's evidence tended to show that defendant needed money to pay rent and other bills and decided that Ms. Fore might have some money. Defendant called her and persuaded her to go out with him and Ms. McNeil. They went to her house and picked her up. Defendant had a pistol under the seat. Before he got out of the car, he took the pistol and put it in his belt. When Ms. Fore got out of the car, he shot her in the head. He then took her keys and money and left her body by the side of the road. This evidence is sufficient to support a finding of premeditation and deliberation. Therefore, we hold that the trial court did not err in denying defendant's motion to dismiss.

Defendant next contends that the trial court erred in denying his request to question potential jurors as to their understanding of the length of time a person would serve if sentenced to life imprisonment for first degree murder. The following exchange took place when defense counsel attempted to elicit this information from a potential juror on voir dire:

> Q. Do you think that life imprisonment means an individual would stay in jail for the rest of his natural life?
>
> MR. STEPHENS [prosecutor]: Objection.
>
> COURT: Sustained.
>
> Q. Do you understand that a person who is sentenced to life imprisonment after being convicted of first degree murder is not entitled to be released?
>
> MR. STEPHENS: Objection.
>
> COURT: Sustained.

Defendant argues that he needed this information to exercise effectively his challenges for cause and his peremptory challenges. He argues that misconceptions of jurors about the possibility of early parole for a defendant sentenced to life imprisonment create an unacceptable risk that the jury will sentence that defendant to death.

Defendant cites *King v. Lynaugh*, 828 F.2d 257 (5th Cir.1987), in support of his argument. In *King*, the appeals panel held that a defendant's Sixth and Fourteenth Amendment rights were infringed when the trial court refused to allow defense counsel to ask questions directed toward determining whether venire members had misconceptions about parole law that might bias them in favor of capital punishment. The panel therefore ordered a new sentencing hearing. *King*, 828 F.2d at 261–62.

Since the filing of briefs and the presentation of the initial oral arguments in this case, the Fifth Circuit Court of Appeals has, after a rehearing *en banc*, reversed the panel decision in pertinent part. *King v. Lynaugh*, 850 F.2d 1055 (5th Cir.1988). The court stated:

> We ... are unable to distinguish possible prejudice based on jurors' misconceptions about parole law from "a host of other possible similar prejudices." The views of a lay venireman about parole are no more likely to be both erroneous and prejudicial than are his views on the defendant's right not to take the stand, the law of parties, the reasonable doubt standard, or any other matter of criminal procedure. It is difficult to conceive how we could constitutionalize the inquiry concerning Texas parole while leaving these similar but also potentially influential matters to the broad discretion of the state trial court.... Deference to the state courts in those matters counsels deference here as well. Interrogating veniremen about Texas parole law ... does not approach a level of constitutional sensitivity.

Id. at 1060 (citations omitted).

This Court has held that the possibility of parole cannot be considered by a jury during sentencing. *State v. Robbins*, 319 N.C. 465, 356 S.E.2d 279, *cert. denied*, — U.S. —, 108 S.Ct. 269, 98 L.Ed.2d 226 (1987); *State v. Brown*, 306 N.C. 151, 293 S.E.2d 569, *cert. denied*, 459 U.S. 1080, 103 S.Ct. 503, 74 L.Ed.2d 642 (1982). In *Robbins*, the jury returned to the courtroom to question whether it had the right to recommend a life sentence without the possibility of parole. The trial court responded by giving the following instruction, which has evolved from this Court's decision in *State*

v. Conner, 241 N.C. 468, 85 S.E.2d 584 (1955):

> The question of eligibility for parole is not a proper matter for you to consider in recommending punishment, and it should be eliminated entirely from your consideration and dismissed from your minds.
>
> In considering whether to recommend death or life imprisonment, you should determine the question as though life imprisonment means exactly what the statute says, imprisonment in the State's prison for life. You should decide the question of punishment according to the issues submitted to you by the Court, wholly uninfluenced by consideration of what another arm of the government might or might not do in the future.

Robbins, 319 N.C. at 518, 356 S.E.2d at 310. We rejected the defendant's argument that the trial court was constitutionally required to inform the jury about parole procedures in order to dispel the misconceptions most jurors have about parole. We held that because parole procedures are irrelevant to a sentencing determination, they cannot be considered by the jury during sentencing. *Id.* at 521–22, 356 S.E.2d at 312.

[3] Here, defendant argues that the court erred by refusing to allow defense counsel to question potential jurors concerning their misconceptions about parole. Because parole eligibility is irrelevant to the issues at trial and is not a proper matter for the jury to consider in recommending punishment, we hold that the court properly refused to allow defense counsel to question potential jurors as to their knowledge about parole eligibility. The Fifth Circuit noted on rehearing in *King* that "Texas policy follows that of the large majority of states and avowedly seeks to assist defendants by forbidding a jury to increase their punishment in anticipation of possible parole or clemency," and that to accept the defendant's contention would be contrary to that policy. *King*, 850 F.2d at 1060–61. We agree with that court that to "re-inject notions of parole eligibility at the forefront of the judicial proceedings," *id.* at 1061, would be an improvident practice. Therefore, we hold that the trial court did not err in denying defendant's request.

Defendant next contends that the trial court erred by excusing three prospective jurors for cause due to their feelings about the death penalty without proper inquiry as to their ability to follow the law and by denying defendant the opportunity to question these prospective jurors. We find no error.

[4] The first prospective juror challenged for cause indicated that she might not be able to vote for the death penalty under any circumstances. The court questioned her:

> Now, the question that we're asking at this point is in that context, in that sentencing proceeding, could you consider both of the alternative punishments, both death and life imprisonment or would you automatically in every case vote for one particular punishment, specifically life imprisonment?
>
> A. I—I could consider both but I don't think I'd want to be a part of a jury that had anything to do with putting anyone to death.
>
> COURT: Well—
>
> A. I wouldn't want to be part of a jury that decided to put someone to death.
>
> COURT: Whether you would want to be part of a jury which did that or not, could you consider both alternative punishments and if you determined that the death penalty was appropriate vote for the death penalty.
>
> A. No.
>
> COURT: You could not?
>
> A. I don't think I could.
>
> COURT: Not under any circumstances?
>
> A. No, I don't think so.

Defendant argues that the excusal for cause of this prospective juror violated *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985). In *Wainwright*, the United States Supreme Court held that a juror could not be excluded for cause based on that juror's views about the

death penalty unless those views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Id.* at 424, 105 S.Ct. at 852, 83 L.Ed.2d at 851–52 (quoting *Adams v. Texas*, 448 U.S. 38, 45, 100 S.Ct. 2521, 2526, 65 L.Ed.2d 581, 589 (1980)). The prospective juror here stated that she did not think that she could, under any circumstances, be part of a jury that sentenced someone to death. It is evident that her views on capital punishment impaired her ability to perform her duties as a juror in accordance with the trial court's instructions and with her oath. Therefore, the trial court did not abuse its discretion by removing her for cause.

The second prospective juror responded that he was opposed to the death penalty. When asked whether his beliefs were so strong that he could not under any circumstances vote for the death penalty, he answered, "That's right." The third prospective juror answered "yes" to the question whether she would vote against the death penalty no matter what the evidence showed. It is evident that these prospective jurors' views on capital punishment impaired their ability to perform their duties as jurors. Therefore, the trial court did not abuse its discretion by removing them for cause.

[5] Defendant also argues that the trial court erred by not allowing him to question each of these prospective jurors before they were excused. However, there is nothing in the record to indicate that any of these prospective jurors would have been rehabilitated by defendant. Their answers to questions propounded by the prosecutor were unambiguous and indicated that they could not put aside their personal views and fulfill their duty according to North Carolina law. In *State v. Reese*, 319 N.C. 110, 353 S.E.2d 352 (1987), we held:

> When challenges for cause are supported by prospective jurors' answers to questions propounded by the prosecutor and by the court, the court does not abuse its discretion, at least in the absence of a showing that further questioning by defendant would likely have produced different answers, by refusing to allow the defendant to question the juror challenged.

Id. at 120–21, 353 S.E.2d at 358 (quoting *State v. Oliver*, 302 N.C. 28, 40, 274 S.E.2d 183, 191 (1981)). Defendant has not made a showing that further questioning would have revealed different answers. Therefore, we find no abuse of discretion in the trial court's decision to deny further inquiry.

Defendant next contends that the trial court abused its discretion by denying his challenges for cause of three prospective jurors. When the court denied defendant's challenges for cause of Ms. Moell and Mr. McLean, defendant used peremptory challenges to remove them. Defendant contends that he had exhausted his fourteen peremptory challenges when the trial court refused to excuse Ms. Jones, and that he was improperly precluded from challenging her.

[6] The record reveals, however, that defendant only used thirteen of his fourteen peremptory challenges during jury voir dire, leaving one remaining peremptory challenge which he could have used to strike Ms. Jones. N.C.G.S. § 15A–1214(h) and (i) state:

> (h) In order for a defendant to seek reversal of the case on appeal on the ground that the judge refused to allow a challenge made for cause, he must have:
>
> (1) Exhausted the peremptory challenges available to him;
>
> (2) Renewed his challenge as provided in subsection (i) of this section; and
>
> (3) Had his renewal motion denied as to the juror in question.
>
> (i) A party who has exhausted his peremptory challenges may move orally or in writing to renew a challenge for cause previously denied if the party either:
>
> (1) Had peremptorily challenged the juror; or
>
> (2) States in the motion that he would have challenged that juror peremptorily had his challenges not been exhausted.

N.C.G.S. § 15A-1214(h), (i) (1988). In *State v. Sanders*, 317 N.C. 602, 346 S.E.2d 451 (1986), we held that "[t]he statutory method for preserving a defendant's right to seek appellate relief when a trial court refuses to allow a challenge for cause is mandatory and is the only method by which such rulings may be preserved for appellate review." *Id.* at 608, 346 S.E.2d at 456; *see also State v. Quesinberry*, 319 N.C. 228, 235, 354 S.E.2d 446, 450 (1987) ("[b]ecause [defendant] did not exhaust his peremptory challenges as provided by N.C.G.S. 15A-1214(h), no prejudice has been shown as to the juror who remained on the panel"). Because defendant did not exhaust his peremptory challenges, he did not comply with the statute. Therefore, he has not preserved his right to appeal on this issue.

[7] Defendant next contends that the trial court erred by failing to intervene *ex mero motu* in portions of the prosecutor's closing argument. The arguments of counsel are left largely to the control and discretion of the trial judge. *State v. Gladden*, 315 N.C. 398, 422, 340 S.E.2d 673, 688, *cert. denied*, 479 U.S. 871, 107 S.Ct. 241, 93 L.Ed.2d 166 (1986). Counsel will be granted wide latitude in the argument of fiercely contested cases. *Id.* Counsel may argue the law, the facts in evidence, and all reasonable inferences to be drawn from them. *Id.* Counsel may not refer to facts not in evidence or argue his or her own knowledge, beliefs and personal opinions not supported by the evidence. *Id.* Because defendant did not object to the portions of the argument to which he now assigns error, "review is limited to an examination of whether the argument was so grossly improper that the trial [court] abused [its] discretion in failing to intervene *ex mero motu*." *Id.* at 417, 340 S.E.2d at 685.

[8] First, defendant argues that the prosecutor improperly told the jury that he "represented" the victim by saying, "Being a prosecutor is not always a pleasant task, for I speak, Mr. Hobgood speaks for two dead ladies who can not speak." Defendant claims that this statement violates the holding in *Booth v. Maryland*, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987). There, the United States Supreme Court held that a sentencing jury must make its recommendation based on the character of the defendant and the circumstances of the crime and not on the personal characteristics of the victim. *Id.* at ——-——, 107 S.Ct. at 2533-34, 96 L.Ed.2d at 448-49. The Supreme Court held that the use of a victim impact statement at the sentencing phase of a capital trial violated the Eighth Amendment. *Id.* at ——, 107 S.Ct. at 2536, 96 L.Ed.2d at 452. Here, unlike in *Booth*, the district attorney did not mention any of the personal characteristics of the victims, nor did he discuss the impact of their deaths on their families. Rather, he reminded the jury that he was an advocate for the two victims. We do not find this argument so grossly improper that the court abused its discretion in failing to intervene *ex mero motu*.

[9] Second, defendant claims that the prosecutor argued facts not in evidence when he said about Ms. Stallings, "She's been stabbed. She's been stripped.... Obviously from this evidence she has been abused. She stands naked begging for her life and he needs a rifle to frighten her." We conclude that there is evidence to support the prosecutor's statements. There was evidence indicating that defendant had removed part of Ms. Stallings' clothes before he shot her. Ms. McNeil testified that defendant took off Ms. Stallings' clothes after he had strangled her and that the strangling took place before Ms. McNeil went to get the rifle. The clothes, found in a pile on the floor, had very little blood on them, although there was much blood on the floor and the walls around the body. The autopsy revealed that the victim had been stabbed and otherwise abused. Dr. LeGrand testified that several of the wounds, including the stab wound, the abdominal wound, and the wounds around the left eye, were inflicted before the victim died. Moreover, Ms. McNeil testified that when defendant started choking Ms. Stallings, she said, "Please, y'all, don't hurt me." It is a reasonable inference from the evidence that, before defendant killed Ms. Stallings, he removed her clothes and she

begged for her life. This argument was not so grossly improper as to require *ex mero motu* intervention by the trial court.

[10] Third, defendant claims that the prosecutor improperly argued what the victim must have thought as she died. The prosecutor said:

> I'm sure she could speak to you quite vividly if she was here to tell you what is fair and what is unfair. I'm sure she said to Leroy McNeil in her own mind, I'm eighteen years old and I don't want to die. I'm going to die and that's just not fair. No doubt she must have thought she'd never see her mother and her sister and her friends again, and [that] just wasn't fair. No doubt she thought to herself that the last person that she would see on this earth is the man who would murder her, and that's certainly not fair.

In *State v. King*, 299 N.C. 707, 264 S.E.2d 40 (1980), we held that the prosecutor's comments concerning the thoughts of the victim before he died that he never would see his family again were not so improper as to require the trial court to intervene *ex mero motu*. *Id.* at 711–13, 264 S.E.2d at 43–44. Likewise, the prosecutor's argument here was not so grossly improper as to require the court to intervene. It was based on facts in evidence and on reasonable inferences from those facts.

We conclude that the guilt phase of defendant's trial was fair and free of prejudicial error.

SENTENCING PHASE

Defendant first contends that the trial court erred in failing to submit as a nonstatutory mitigating circumstance that he was remorseful. When defense counsel requested this circumstance, the court asked what evidence showed remorse. Defense counsel responded that "the evidence of the confession shortly after the murders took place is evidence of the remorsefulness of the defendant." The court then refused to submit defendant's remorse as a mitigating circumstance.

[11] A trial court has no duty to instruct on a mitigating circumstance unless the record discloses evidence from which the jury could reasonably infer that the circumstance exists. *State v. Wilson*, 322 N.C. 117, 143, 367 S.E.2d 589, 604 (1988). We have examined defendant's confession and find no expression of remorse. Therefore, we hold that the trial court did not err in failing to submit remorse as a mitigating circumstance.

Defendant argues, however, that his statement to the jury in the form of an allocution supports an instruction on this mitigating circumstance. After the court refused to submit defendant's remorse as a mitigating circumstance, and prior to the special prosecutor's closing argument to the jury, the court allowed defendant to address the jury. Defendant stated:

> I won't take up too much of your time because I realize there's nothing that I can say or anyone here in this courtroom can say that would bring back the lives of those two girls, even my saying that I'm sorry is not going to bring them back. This thirteen or fourteen months that I have been locked up or incarcerated has really brought a lot back to me. It made me realize that there's a lot that I have done, minor things and major things, that if I had to do them again now today I know that I would not do and I deeply say inside that I am sorry for what I have done and I wish there was some way that you all could take it under consideration and spare my life and give me a chance.

Before the court charged the jury, defendant did not renew his request that the court submit remorse as a mitigating circumstance. After the court charged the jury, the court asked whether defendant had requests for additional instructions. Defense counsel responded that he did not.

[12] The trial court did not err in refusing to submit remorse as a mitigating circumstance based on defendant's statement that he was sorry for committing the crimes. Defendant's statement to the jury was made in allocution. He was not under oath, nor was he subject to cross-examina-

tion. Absent such, his statement was not evidence. Therefore, the court had no duty to instruct on remorse. *See id.*

Defendant next contends that the trial court erred by failing to intervene *ex mero motu* in portions of the prosecutor's closing argument. Because defendant did not object to the portions of the argument to which he now assigns error, "review is limited to an examination of whether the argument was so grossly improper that the trial [court] abused [its] discretion in failing to intervene *ex mero motu*." *State v. Gladden*, 315 N.C. 398, 417, 340 S.E.2d 673, 685, *cert. denied*, 479 U.S. 871, 107 S.Ct. 241, 93 L.Ed.2d 166 (1986).

Defendant first argues that the prosecutor made assertions which were not supported by the evidence. The prosecutor commented on defendant's allocution as follows:

> He has the right of eloquention [sic] and he just expressed that right. He spoke with you about that request. He also had that right in 1977, and I wonder what he told the Judge when he pled guilty to killing his wife before he was sentenced.
>
> Do you believe him? Do you really think he's sorry?

The prosecutor then said that the only appropriate sentence for defendant was death, and asked, "If you tell me we have not yet reached that point, then please tell me how many bodies it takes. Is there some magic number? Is three not enough?" Finally, the prosecutor called the women on the jury by name, then asked them collectively how they would have felt

> if he had said to you as you stood naked before him and you begged for your life with all the fiber in your being, if he had said to you: Today you will die I have decided, not God, not nature, I have decided. I have decided the place where you will die. I have decided the time of your death. I have decided the manner of your death. Can you conceivably close your eyes and think how you would have felt? You can't, you can't, you really can't. There's no way that you can appreciate the horror of that or the terror of that, nor can I, and I certainly hope that you never will have to, nor will I.

[13–15] We conclude that the prosecutor's argument was not so grossly improper that the court abused its discretion in failing to intervene *ex mero motu*. It was not improper for the prosecutor to comment on defendant's prior conviction of involuntary manslaughter, because that conviction was in evidence. Further, the prosecutor's question, "Is three not enough?" did not require *ex mero motu* intervention by the court. *See State v. Holden*, 321 N.C. 125, 156, 362 S.E.2d 513, 532 (1987), *cert. denied*, — U.S. —, 108 S.Ct. 2835, 100 L.Ed.2d 935 (1988) (prosecutor's question "How many more women are we going to have to see this man rape before we say enough is enough?" not so grossly improper as to require *ex mero motu* intervention). Finally, the prosecutor's address to the women on the jury was not so grossly improper as to require *ex mero motu* intervention. We held in *Holden* that the trial court properly sustained the State's objection to a part of the defense counsel's jury argument asking each juror individually to save the defendant's life. *Id.* at 163, 362 S.E.2d at 537. However, here the prosecutor did not make a personal plea to each female juror; rather, he called them by name, then spoke to them collectively.

Second, defendant argues that the prosecutor improperly appealed to community sentiment in suggesting that only a death sentence would prevent this type of crime. The prosecutor said:

> You are the moral conscience of this community....
>
> ... Today I'm asking you to be a part of enforcement of our law. Police officers can't do it by themselves....
>
> ....
>
> ... Your verdict as the jury in this case is a message to your community, to your state and to your world. The question is: What will your message be? The eyes of your community are upon you. There's no getting around it. I suggest to you that you do all have the ability to stand confidently before this

Court and be satisfi
ty beyond a reasor
spect to the law a
the just and proper
these two cases is t
sentenced to death.
that under the law
there's no other re

....

I tell you again th
munity are upon y
will you speak from
you can tell me tha

We have upheld arg
tors suggesting to juri
"voice and conscience
and that they have
something about serio
Brown, 320 N.C. 179, 2
18, *cert. denied*, —
467, 98 L.Ed.2d 406 (19
315 N.C. 773, 780–81,
95 (1986). Defendant
that *State v. Scott*, 31
2d 296 (1985), controls
the defendant was ch
under the influence an
all arising out of a fa
The prosecutor argued
of public sentiment at
driving and drinking, c
the highway." We held
was improper because
record and appealed to
the defendant because i
caused other accidents
S.E.2d at 298. The St
"asking the jury to l
community rather than
ing *Prado v. State*, 62
(Tex.Crim.1982)).

[16] In the case n
prosecutor asked the ju
would send to the comm
an ear to the communit
prosecutor did not go
and appeal to the jury t
because other murderer
victims, nor did he enc
base its determination o
See State v. Robbins,
356 S.E.2d 279, 313, *cer*

Court and be satisfied to a moral certainty beyond a reasonable doubt with respect to the law and the evidence that the just and proper verdict in this case, in these two cases is that the defendant be sentenced to death. I suggest to you that under the law and under the facts there's no other reasonable alternative.

....

I tell you again the eyes of your community are upon you. What message will you speak from your verdict? Only you can tell me that.

We have upheld arguments by prosecutors suggesting to juries that they are the "voice and conscience of the community" and that they have an obligation to do something about serious crime. *State v. Brown*, 320 N.C. 179, 203–04, 358 S.E.2d 1, 18, *cert. denied*, — U.S. —, 108 S.Ct. 467, 98 L.Ed.2d 406 (1987); *State v. Miller*, 315 N.C. 773, 780–81, 340 S.E.2d 290, 294–95 (1986). Defendant argues, however, that *State v. Scott*, 314 N.C. 309, 333 S.E.2d 296 (1985), controls this issue. In *Scott*, the defendant was charged with driving under the influence and two other counts, all arising out of a fatal traffic accident. The prosecutor argued that "there's a lot of public sentiment at this point against driving and drinking, causing accidents on the highway." We held that this argument was improper because it went outside the record and appealed to the jury to convict the defendant because impaired drivers had caused other accidents. *Id.* at 312, 333 S.E.2d at 298. The State was improperly "asking the jury to lend an ear to the community rather than a voice." *Id.* (quoting *Prado v. State*, 626 S.W.2d 775, 776 (Tex.Crim.1982)).

[16] In the case now before us, the prosecutor asked the jury what message it would send to the community, not to "lend an ear to the community." Moreover, the prosecutor did not go outside the record and appeal to the jury to convict defendant because other murderers had killed other victims, nor did he encourage the jury to base its determination on public sentiment. *See State v. Robbins*, 319 N.C. 465, 524, 356 S.E.2d 279, 313, *cert. denied*, — U.S. —, 108 S.Ct. 269, 98 L.Ed.2d 226 (1987). Rather, he reminded the jurors that they must decide the case on the evidence and the law. Therefore, his argument did not require *ex mero motu* intervention by the court.

[17] Third, defendant claims that the following argument by the prosecutor was grossly improper because it asked the jurors to set a standard for their community regarding the imposition of the death penalty:

> I think you can say from this evidence that we have reached a point with Leroy McNeil which the only sentence appropriate under the law is death. If you tell me we have not yet reached that point, then please tell me how many bodies it takes. Is there some magic number? Is three not enough? If you tell me you don't agree, then you tell me what greater violation of the human being and acts of degradation on a victim you would require beyond that which Faye Stallings suffered. I suggest to you that your mind may not allow you to find much greater degradation, much greater violation of the spirit, much greater destruction of human dignity prior to death.

The prosecutor stated further:

> Dr. Rose testified that he has appeared before, testified in cases, names like Barfield, Hutchins, Kirkley, McDougall, names [that will] forever remain in infamy in North Carolina, names that are synonymous with death. Leroy McNeil has joined that group of people.

Defendant argues that asking the jury to consider other cases in which death sentences have been imposed violates defendant's right to individualized sentencing in a capital case. Finally, defendant argues that the prosecutor tried to absolve the jurors of their responsibility for putting someone to death by telling them that if they returned a recommendation of the death sentence, defendant, not the jury, would be responsible for his execution. These arguments were not so grossly improper as to require the trial court to intervene *ex mero motu*.

Defendant next contends that the trial court erred in instructing the jury as follows:

> [T]he first aggravating circumstance, if it applies at all, would under the evidence in this case apply in both cases. It reads as follows:
>
> [H]as [defendant] been previously convicted of a felony involving the use of violence to the person? Now voluntary manslaughter is by definition a felony involving the use of violence to the person.
>
> . . . . .
>
> The court also instructed the jurors that if they did not find the existence of this aggravating circumstance, then they should answer the circumstance "no" for both murders.

Defendant argues that the court's instruction was an improper expression of opinion and that the jury would have understood the instruction to mean that the State had established this aggravating circumstance. He argues that the instruction set up an irrebuttable presumption, lessening the State's burden of proving this circumstance beyond a reasonable doubt.

[18] Because defendant did not object to this instruction at trial, he must show that the court committed plain error in giving the instruction. *State v. Zuniga*, 320 N.C. 233, 263, 357 S.E.2d 898, 917, *cert. denied*, — U.S. —, 108 S.Ct. 359, 98 L.Ed.2d 384 (1987). The test is whether the alleged error had a probable impact on the verdict. *Id.*

[19] In *State v. McDougall*, 308 N.C. 1, 301 S.E.2d 308, *cert. denied*, 464 U.S. 865, 104 S.Ct. 197, 78 L.Ed.2d 173 (1983), we held that where a prior crime committed by the defendant has the use or threat of violence as an element, introduction of the record of the prior conviction can support a peremptory instruction on this aggravating circumstance. *Id.* at 22, 301 S.E.2d at 321. Here, the State introduced the record of defendant's prior conviction of the voluntary manslaughter of his former wife, Cynthia Latham McNeil. Defendant did not offer evidence that the killing of his former wife did not involve the use of violence to the person. Voluntary manslaughter is the unlawful killing of another without malice and without premeditation and deliberation. *State v. Barts*, 316 N.C. 666, 692, 343 S.E.2d 828, 845 (1986). "Generally, voluntary manslaughter occurs when one kills intentionally but does so in the heat of passion suddenly aroused by adequate provocation or in the exercise of self-defense where excessive force is utilized or the defendant is the aggressor." *Id.* Voluntary manslaughter usually—probably always—involves violence to the person within the meaning and intent of N.C.G.S. § 15A-2000(e)(3). In light of this, and of defendant's failure to offer evidence that the killing of his former wife did not involve violence to the person, we cannot conclude that the court's instruction that voluntary manslaughter is a crime involving the use of violence to the person amounted to plain error.

[20] Defendant also argues that the trial court erred by instructing the jury on this aggravating circumstance that "the first aggravating circumstance, if it applies at all, would under the evidence in this case apply in both cases." Defendant claims that this language prohibited the jury from considering this aggravating circumstance separately as to each murder, citing *State v. Parrish*, 275 N.C. 69, 165 S.E.2d 230 (1969). In *Parrish* we held that the trial court must instruct the jury to give separate consideration to cases of two codefendants being tried jointly for the same crime. This case, however, involves one defendant on trial for two murders. The evidence supporting the aggravating circumstance that defendant had been convicted previously of a felony involving the use of violence to the person was identical in both cases. We find no plain error.

Defendant next contends that the trial court erred by submitting the aggravating circumstance that the murder of Ms. Stallings was especially heinous, atrocious, or cruel. N.C.G.S. § 15A-2000(e)(9) (1988). This aggravating circumstance exists where "the level of brutality involved exceeds that normally present in first-degree

murder, or when t
question was cons
necessarily tortur
v. Brown, 315 N.C
826-27 (1985), *cer*
106 S.Ct. 2293, 90
ruled on other g
ver, 321 N.C. 570
(citations omitted).
appropriate whe
an unusual deprav
of the defendant
present in first-de
N.C. at 65, 337 S.

[21] Ms. McNei
ant grabbed Ms. St
pulled out a knife,
bedroom. He dem
then choked her u
ness. Finally, he t
his rifle from next
he shot Ms. Stalling
to show that defe
and shot the victim,
stabbed her, and hit
wooden frame whic
of it. There was al
show that defendant
vagina. This eviden
that the murder was
unnecessarily tortur
trial court, therefore,
ting as an aggravat
the murder was es
cious or cruel.

[22] Defendant n
trial court erred by su
vating circumstance t
committed while defe
the commission of a
§ 15A-2000(e)(5) (198
convicts a defendant o
based solely on the fel
improper for the court
lying felony as one of
cumstances define
§ 15A-2000(e)(5). *St*
N.C. 223, 262, 275 S.E
However, when a defe
first degree murder ba
tation and deliberation
der rule, and both the

murder, or when the first-degree murder in question was conscienceless, pitiless, or unnecessarily torturous to the victim." *State v. Brown*, 315 N.C. 40, 65, 337 S.E.2d 808, 826–27 (1985), *cert. denied*, 476 U.S. 1165, 106 S.Ct. 2293, 90 L.Ed.2d 733 (1986), *overruled on other grounds, State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988) (citations omitted). "[T]his factor is [also] appropriate when the killing demonstrates an unusual depravity of mind on the part of the defendant beyond that normally present in first-degree murder." *Id.* 315 N.C. at 65, 337 S.E.2d at 827.

[21] Ms. McNeil testified that defendant grabbed Ms. Stallings around the neck, pulled out a knife, and forced her into the bedroom. He demanded her food stamps, then choked her until she lost consciousness. Finally, he told Ms. McNeil to get his rifle from next door, and when she did, he shot Ms. Stallings. The evidence tends to show that defendant not only choked and shot the victim, but that he beat her, stabbed her, and hit her in the face with a wooden frame which had nails sticking out of it. There was also evidence tending to show that defendant pushed feces into her vagina. This evidence is sufficient to show that the murder was excessively brutal and unnecessarily torturous to the victim. The trial court, therefore, did not err in submitting as an aggravating circumstance that the murder was especially heinous, atrocious or cruel.

[22] Defendant next contends that the trial court erred by submitting as an aggravating circumstance that each murder was committed while defendant was engaged in the commission of a robbery. N.C.G.S. § 15A–2000(e)(5) (1988). Where the jury convicts a defendant of first degree murder based solely on the felony murder rule, it is improper for the court to submit the underlying felony as one of the aggravating circumstances defined by N.C.G.S. § 15A–2000(e)(5). *State v. Silhan*, 302 N.C. 223, 262, 275 S.E.2d 450, 478 (1981). However, when a defendant is convicted of first degree murder based on both premeditation and deliberation and the felony murder rule, and both theories are supported by the evidence, the underlying felony may be submitted as an aggravating circumstance. *Id.*

Defendant argues that there was insufficient evidence of premeditation and deliberation to warrant submission of first degree murder on that theory to the jury. We have held that the evidence was sufficient to support the elements of premeditation and deliberation in the murder of Deborah Fore. We also hold that the evidence is sufficient to support the elements of premeditation and deliberation in the murder of Elizabeth Stallings. Because defendant was convicted of both first degree murders on a premeditation and deliberation theory, as well as on a felony murder theory, the court did not err in submitting, for each murder, the aggravating circumstance that the murder was committed while defendant was engaged in the commission of a robbery.

Defendant raises the following "preservation" issues:

(1) He contends that the trial court erroneously excluded prospective jurors for cause because of their feelings about capital punishment. Both the United States Supreme Court and this Court have held that "death qualification" of a jury is not unconstitutional. *Lockhart v. McCree*, 476 U.S. 162, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986); *State v. Evangelista*, 319 N.C. 152, 166, 353 S.E.2d 375, 385 (1987).

[23] (2) He contends that the trial court erred in instructing the jury that a rifle and a pistol are deadly weapons as a matter of law. This was not error. *State v. Torain*, 316 N.C. 111, 120, 340 S.E.2d 465, 470, *cert. denied*, 479 U.S. 836, 107 S.Ct. 133, 93 L.Ed.2d 77 (1986).

(3) He contends that N.C.G.S. § 15A–2000(e)(9), which allows the jury to find as an aggravating circumstance that the murder was "especially heinous, atrocious, or cruel," has been applied unconstitutionally. This argument is without merit. *State v. Fullwood*, 323 N.C. 371, 399–400, 373 S.E.2d 518, 535 (1988).

(4) He contends that N.C.G.S. § 15A–2000 is unconstitutionally vague and

overbroad, both facially and as applied. This argument is without merit. *State v. Brown*, 315 N.C. 40, 60–61, 337 S.E.2d 808, 823–24 (1985), *cert. denied*, 476 U.S. 1165, 106 S.Ct. 2293, 90 L.Ed.2d 733 (1986), *overruled on other grounds, State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988).

(5) He contends that the trial court erred in instructing the jury that it had a duty to return a recommendation of death if it found that the mitigating circumstances were insufficient to outweigh the aggravating circumstances and that the aggravating circumstances were sufficiently substantial to call for the imposition of the death penalty. This argument is without merit. *State v. Robbins*, 319 N.C. 465, 515, 356 S.E.2d 279, 308–09, *cert. denied*, — U.S. —, 108 S.Ct. 269, 98 L.Ed.2d 226 (1987).

(6) He contends that the trial court erred in failing to instruct the jury that the State had the burden of proving the nonexistence of each mitigating circumstance beyond a reasonable doubt and in placing the burden on defendant to prove each mitigating circumstance by a preponderance of the evidence. This argument is without merit. *State v. Gladden*, 315 N.C. 398, 439, 340 S.E.2d 673, 698, *cert. denied*, 479 U.S. 871, 107 S.Ct. 241, 93 L.Ed.2d 166 (1986).

(7) Finally, he contends that the trial court erred in instructing the jurors that they must be unanimous before they could find the existence of a mitigating circumstance. Defendant bases this argument on *Mills v. Maryland*, 486 U.S. —, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988). For the reasons expressed in *State v. McKoy*, 323 N.C. 1, 372 S.E.2d 12 (1988), we reject this argument.

We conclude that the sentencing phase of defendant's trial was fair and free of prejudicial error.

PROPORTIONALITY REVIEW

Because we have found no error in the guilt and sentencing phases, we are required to review the record and determine: (1) whether the record supports the jury's findings of the aggravating circumstances upon which the sentencing court based its sentences of death; (2) whether the sentences were imposed under the influence of passion, prejudice, or any other arbitrary factor; and (3) whether the sentences of death are excessive or disproportionate to the penalty imposed in similar cases, considering both the crimes and the defendant. N.C.G.S. § 15A-2000(d)(2) (1988); *State v. Robbins*, 319 N.C. 465, 526, 356 S.E.2d 279, 315 (1987), *cert. denied*, — U.S. —, 108 S.Ct. 269, 98 L.Ed.2d 226 (1988).

The jury found three aggravating circumstances in the murder of Elizabeth Stallings: (1) defendant had been convicted previously of a felony involving the use of violence to the person, (2) the murder took place during the commission of robbery with a firearm, and (3) the murder was especially heinous, atrocious or cruel. N.C.G.S. § 15A-2000(e)(3), (5), (9) (1988). The jury found two aggravating circumstances in the murder of Deborah Fore: (1) defendant had been convicted previously of a felony involving the use of violence to the person, and (2) the murder took place during the commission of robbery with a firearm. N.C.G.S. § 15A-2000(e)(3), (5) (1988). The record fully supports the jury's findings of these aggravating circumstances.

We find nothing in the record which suggests that the sentences of death were imposed under the influence of passion, prejudice, or any other arbitrary factor. We thus turn to our final statutory duty of proportionality review.

In conducting proportionality review, we "determine whether the death sentence in this case is excessive or disproportionate to the penalty imposed in similar cases, considering the crime and the defendant." *State v. Brown*, 315 N.C. 40, 70, 337 S.E.2d 808, 829 (1985), *cert. denied*, 476 U.S. 1165, 106 S.Ct. 2293, 90 L.Ed.2d 733 (1986), *overruled on other grounds, State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988). We use the "pool" of similar cases announced in *State v. Williams*, 308 N.C. 47, 301 S.E.2d 335, *cert. denied*, 464 U.S. 865, 104 S.Ct. 202, 78 L.Ed.2d 177, *reh'g denied*, 464 U.S. 1004, 104 S.Ct. 518, 78 L.Ed.2d 704 (1983). *Id.* However, "[w]e do not find it necessary to extrapolate or analyze *in our opinions* all, or any particular number, of

the cases in our proportionality pool." *State v. Robbins*, 319 N.C. at 529, 356 S.E.2d at 316 (emphasis in original).

This Court has found the death sentence disproportionate in seven cases. *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988); *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987); *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986), *overruled on other grounds, State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988); *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985); *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984); *State v. Bondurant*, 309 N.C. 674, 809 S.E.2d 170 (1983); and *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983). In none of these cases was the defendant convicted of more than one murder.

In the case now before us, defendant was convicted of two first degree murders. We stated in *Robbins* that "[a] heavy factor against Robbins is that he is a multiple killer." *Robbins*, 319 N.C. at 529, 356 S.E.2d at 316. We have affirmed the death penalty in numerous cases in which the defendant killed or seriously injured more than one person. *See, e.g., State v. Noland*, 312 N.C. 1, 25, 320 S.E.2d 642, 656 (1984), *cert. denied*, 469 U.S. 1230, 105 S.Ct. 1232, 84 L.Ed.2d 369, *reh'g denied*, 471 U.S. 1050, 105 S.Ct. 2044, 85 L.Ed.2d 342 (1985) (citing other cases).

Defendant argues that *State v. King*, 316 N.C. 78, 340 S.E.2d 71 (1986); *State v. Whisenant*, 308 N.C. 791, 303 S.E.2d 784 (1983); and *State v. Crews & Turpin*, 296 N.C. 607, 252 S.E.2d 745 (1979), where juries returned life sentences, are the cases in the pool most comparable to this case. We disagree.

The murders in *King*, *Whisenant*, and *Crews & Turpin*, although cruel and senseless, did not rise to the same level of brutality as the murders here. In *King*, the defendant shot into a house where his former girlfriend was hiding from him, killing her mother and sister. *King*, 316 N.C. at 79, 340 S.E.2d at 72. The jury convicted the defendant on a felony murder theory rather than on a premeditation and deliberation theory. *See id.* at 80, 340 S.E.2d at 72–73. In *Whisenant*, the defendant was convicted of killing an elderly man and his housekeeper. *Whisenant*, 308 N.C. at 792, 303 S.E.2d at 785. However, that jury convicted the defendant of only one count of first degree murder; the other conviction was for second degree murder. *See id.* at 792, 303 S.E.2d at 784. In *Crews & Turpin*, the defendants lured two men to their campsite on the pretense that someone had car trouble. Defendant Crews shot one of the men and took his wallet. When the other man tried to run away, defendant Turpin shot him. *Crews & Turpin*, 296 N.C. at 610, 252 S.E.2d at 748. Although *Crews & Turpin* is somewhat similar to the present case, there are two important distinctions: first, although each defendant was convicted of two counts of first degree murder, each defendant actually shot only one man; second, there was no physical torture involved in either murder, as there was in the murder of Elizabeth Stallings here. *See id.*

The facts of this case are more similar to the facts in *Robbins*. There, the jury convicted the defendant of two counts of first degree murder and returned a recommendation of the death sentence for each murder. Although we remanded one of the murder counts to the trial court for a new sentencing hearing, we examined the other murder and determined the death penalty not to be disproportionate. *Robbins*, 319 N.C. at 530, 356 S.E.2d at 316. Robbins killed his two victims in three days. *Id.* at 528, 356 S.E.2d at 317. He took them both to isolated areas, then shot them. *Id.* at 528, 356 S.E.2d at 316. The same aggravating circumstances found by the jury in *Robbins*—that the defendant had been previously convicted of a felony involving the use or threat of violence to the person, and that the murder was committed while the defendant was engaged in the commission of robbery with a firearm, *id.* at 526, 356 S.E.2d at 315—were found by the jury as to both murders here, and here the jury also found as an aggravating circumstance in the murder of Elizabeth Stallings that the murder was especially heinous, atrocious or cruel. We concluded in *Robbins* that under the circumstances the death sentence was not disproportionate or exces-

sive, considering both the crime and the defendant. *Id.* at 529, 356 S.E.2d at 317.

[24] This case, like *Robbins*, involves two premeditated and deliberated first degree murders. The evidence shows that defendant killed Elizabeth Stallings to get money after spending his money on alcohol. He persuaded her to get in his car, planned to rob her, and drove her to an isolated area. He then robbed and brutally murdered her. After the murder, defendant continued to reside next door to the building where her body lay. Two days later, after another drinking spree, he planned to rob Deborah Fore. He called her and invited her to go out with him. After she got into his car, he drove to an isolated area and shot her. He then stole several things from her apartment.

Further, the jury found that defendant had been convicted previously of a felony involving the use of violence to the person—the voluntary manslaughter of his wife. The evidence at trial showed, therefore, that defendant had killed three people.

Under these circumstances, considering both the crimes and the defendant, we cannot say that the death penalty recommendations here were excessive or disproportionate to the penalty imposed in similar cases.

We hold that the defendant received a fair trial and sentencing hearing, free of prejudicial error. In comparing this case to similar cases in which the death penalty was imposed, and in considering both the crimes and the defendant, we cannot hold as a matter of law that the death sentences were disproportionate or excessive. *State v. Robbins*, 319 N.C. at 529, 356 S.E.2d at 317.

NO ERROR.

EXUM, Chief Justice, concurring.

I concur with the majority's treatment of all issues in the guilt and sentencing phases of this trial.

If in the sentencing phase the Court were addressing for the first time the mitigating circumstance unanimity instruction issue, I would agree with defendant's position that these instructions violate the Eighth Amendment to the federal constitution as that amendment was interpreted in *Mills v. Maryland*, 486 U.S. ——, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988), for the reasons stated in my dissenting opinions in *State v. McKoy*, 323 N.C. 1, 372 S.E.2d 12 (1988), and *State v. Allen*, 323 N.C. 208, 372 S.E.2d 855 (1988). The majority's position on this issue is, as a result of the Court's decisions in *McKoy* and *Allen*, the law of this state to which I am now bound. For this reason I concur with the majority's treatment of this issue.

FRYE, Justice, dissenting as to sentence.

For the reasons expressed in the Chief Justice's dissenting opinions in *State v. McKoy*, 323 N.C. 1, 372 S.E.2d 12 (1988), and in *State v. Allen*, 323 N.C. 208, 372 S.E.2d 855 (1988), I believe the United States Supreme Court's decision in *Mills v. Maryland*, 486 U.S. ——, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988), requires that defendant be given a new sentencing hearing. Accordingly, I dissent from that portion of the Court's opinion which rejects defendant's argument based upon the holding of *Mills*. I concur in the result reached by the majority on the guilt phase issues.



APPENDIX B: Text of North Carolina Rule of Appellate Procedure 32(b)

Rule 32: Mandates of the Courts

(a) In General. Unless a court of the appellate division directs that a formal mandate shall issue, the mandate of the court consists of certified copies of its judgment and of its opinion and any direction of its clerk as to costs. The mandate is issued by its transmittal from the clerk of the issuing court to the clerk or comparable officer of the tribunal from which appeal was taken to the issuing court.

(b) Time of Issuance. Unless a court orders otherwise, its clerk shall enter judgment and issue the mandate of the court 20 days after the written opinion of the court has been filed with the clerk.

APPENDIX C: Text of North Carolina General Statute § 15A-2000

§ 15A-2000. Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.

(a) Separate Proceedings on Issue of Penalty. —

(1) Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. A capital felony is one which may be punishable by death.

(2) The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable after the guilty verdict is returned. If prior to the time that the trial jury begins its deliberations on the issue of penalty, any juror dies, becomes incapacitated or disqualified, or is discharged for any reason, an alternate juror shall become a part of the jury and serve in all respects as those selected on the regular trial panel. An alternate juror shall become a part of the jury in the order in which he was selected. If the trial jury is unable to reconvene for a hearing on the issue of penalty after having determined the guilt of the accused, the trial judge shall impanel a new jury to determine the issue of the punishment. If the defendant pleads guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose. A jury selected for the purpose of determining punishment in a capital case shall be selected in the same manner as juries are selected for the trial of capital cases.

(3) In the proceeding there shall not be any requirement to resubmit evidence presented during the guilt determination phase of the case, unless a new jury is impaneled, but all such evidence is competent for the jury's consideration in passing on punishment. Evidence may be presented as to any matter that the court deems relevant to sentence, and may include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (e) and (f). Any evidence which the court deems to have probative value may be received.

(4) The State and the defendant or his counsel shall be permitted to present argument for or against sentence of death. The defendant or defendant's counsel shall have the right to the last argument.

(b) Sentence Recommendation by the Jury. — Instructions determined by the trial judge to be warranted by the evidence shall be given by the court in its charge to the jury prior to its deliberation in determining sentence. In all cases in which the death penalty may be authorized, the judge shall include in his instructions to the jury that it must consider any aggravating circumstance or circumstances or mitigating circumstance or circumstances from the lists provided in subsections (e) and (f) which may be supported by the evidence, and shall furnish to the jury a written list of issues relating to such aggravating or mitigating circumstance or circumstances.

After hearing the evidence, argument of counsel, and instructions of the court, the jury shall deliberate and render a sentence recommendation to the court, based upon the following matters:

(1) Whether any sufficient aggravating circumstance or circumstances as enumerated in subsection (e) exist;

(2) Whether any sufficient mitigating circumstance or circumstances as enumerated in subsection (f), which outweigh the aggravating circumstance or circumstances found, exist; and

(3) Based on these considerations, whether the defendant should be sentenced to death or to imprisonment in the State's prison for life.

The sentence recommendation must be agreed upon by a unanimous vote of the 12 jurors. Upon delivery of the sentence recommendation by the foreman of the jury, the jury shall be individually polled to establish whether each juror concurs and agrees to the sentence recommendation returned.

If the jury cannot, within a reasonable time, unanimously agree to its sentence recommendation, the judge shall impose a sentence of life imprisonment; provided, however, that the judge shall in no instance impose the death penalty when the jury cannot agree unanimously to its sentence recommendation.

(c) Findings in Support of Sentence of Death. — When the jury recommends a sentence of death, the foreman of the jury shall sign a writing on behalf of the jury which writing shall show:

(1) The statutory aggravating circumstance or circumstances which the jury finds beyond a reasonable doubt; and

(2) That the statutory aggravating circumstance or circumstances found by the jury are sufficiently substantial to call for the imposition of the death penalty; and,

(3) That the mitigating circumstance or circumstances are insufficient to outweigh the aggravating circumstance or circumstances found.

(d) Review of Judgment and Sentence. —

(1) The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of North Carolina pursuant to procedures established by the Rules of Appellate Procedure. In its review, the Supreme Court shall consider the punishment imposed as well as any errors assigned on appeal.

(2) The sentence of death shall be overturned and a sentence of life imprisonment imposed in lieu thereof by the Supreme Court upon a finding that the record does not support the jury's findings of any aggravating circumstance or circumstances upon which the sentencing court based its sentence of death, or upon a finding that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, or upon a finding that the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. The Supreme Court may suspend consideration of death penalty cases until such time as the court determines it is prepared to make the comparisons required under the provisions of this section.

(3) If the sentence of death and the judgment of the trial court are reversed on appeal for error in the post-verdict sentencing proceeding, the Supreme Court shall order that a new sentencing hearing be conducted in conformity with the procedures of this Article.

(e) Aggravating Circumstances. — Aggravating circumstances which may be considered shall be limited to the following:

(1) The capital felony was committed by a person lawfully incarcerated.

(2) The defendant had been previously convicted of another capital felony.

(3) The defendant had been previously convicted of a felony involving the use or threat of violence to the person.

(4) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(5) The capital felony was committed while the defendant was engaged, or was an aider or abettor, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any homicide, robbery, rape or a sex offense, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(6) The capital felony was committed for pecuniary gain.

(7) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(8) The capital felony was committed against a law-enforcement officer, employee of the Department of Correction, jailer, fireman, judge or justice, former judge or justice, prosecutor or former prosecutor, juror or former juror, or witness or former witness against the defendant, while engaged in the performance of his official duties or because of the exercise of his official duty.

(9) The capital felony was especially heinous, atrocious, or cruel.

(10) The defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(11) The murder for which the defendant stands convicted was part of a course of conduct in which the defendant engaged and which included the commission by the defendant of other crimes of violence against another person or persons.

(f) Mitigating Circumstances. — Mitigating circumstances which may be considered shall include, but not be limited to, the following:

(1) The defendant has no significant history of prior criminal activity.

(2) The capital felony was committed while the defendant was under the influence of mental or emotional disturbance.

(3) The victim was a voluntary participant in the defendant's homicidal conduct or consented to the homicidal act.

(4) The defendant was an accomplice in or accessory to the capital felony committed by another person and his participation was relatively minor.

(5) The defendant acted under duress or under the domination of another person.

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired.

(7) The age of the defendant at the time of the crime.

(8) The defendant aided in the apprehension of another capital felon or testified truthfully on behalf of the prosecution in another prosecution of a felony.

(9) Any other circumstance arising from the evidence which the jury deems to have mitigating value. (1977, c. 406, s. 2; 1979, c. 565, s. 1; c. 682, s. 9; 1981, c. 652, s. 1.)

APPENDIX D: TRIAL COURT'S INSTRUCTIONS TO JURY AT SENTENCING

COURT: Members of the jury, having found the defendant Leroy McNeil guilty of first degree murder of Elizabeth Stallings and Deborah Fore, it is now your duty to recommend to the Court whether the defendant should be sentenced to death or to life imprisonment in each of these cases. Your recommendation will be binding upon this Court. If you unanimously recommend that this defendant be sentenced to death in either case, this Court will be required to impose a sentence of death in that case. If you unanimously recommend a sentence of life imprisonment in either case, and you must consider each case separately, the Court will be required to impose a sentence of life imprisonment in the State's prison.

Now all of the evidence relevant to your recommendation has been presented. There is no requirement to resubmit during the sentencing procedure any evidence that was submitted during the guilt phase of this case. All of the evidence which you heard in both phases of the case is competent for your consideration in recommending punishment.

It is now your duty to decide from all of the evidence presented in both phases what the facts are. You must then apply the law which I am about to give you concerning punishment to those facts. It is absolutely necessary that you understand and apply the law as I give it to you, and not as you think it is, or might like it to be.

This is important, because justice requires everyone who is sentenced for first degree murder have the sentence recommendation determined in the same manner, and have the same law applied to him.

You, ladies and gentlemen, as the triers of fact, are again the sole judges of the credibility of each witness. You must decide for yourselves whether to believe the testimony of any witness. You may believe all, or any part, or none of what a witness has said on the stand.

In determining whether to believe any witness, you should apply those same tests of truthfulness which you apply in your everyday affairs in making your most important business decisions. As applied to this trial, these tests may include, among others, the following: The opportunity of a witness to see, hear, know or remember the facts or occurrences about which he or she has testified; the manner and appearance of a witness; any interest, bias or prejudice the witness may have; the apparent understanding and fairness of the witness, whether the witness' testimony is reasonable; and whether the witness' testimony is consistent with other believable evidence in the case.

You are again the sole judge of the weight to be given any evidence. By this I mean, if you decide that certain evidence is believable you must then determine the importance of that evidence in light of all other believable

PERSAD CO., BAYONNE, N.J. 07002 FORM 2004

evidence in the case.

Now at this time, ladies and gentlemen, I shall very briefly summarize what some of the evidence presented by the State and some of the evidence presented by the defendant tends to show as to these two cases. In the case of the State of North Carolina versus Leroy McNeil, involving the first murder of Elizabeth Stallings, the State has offered evidence tending to show that on or about the 8th day of April, 1983, the defendant Leroy McNeil and his wife picked up the deceased, Elizabeth Faye Stallings, and they picked up Ms. Stallings with the inducement that they would go somewhere to party, to engage in activities together. That initially this was presented to Ms. Stallings as a very friendly kind of meeting. The defendant and Penny McNeil took Elizabeth Stallings to an abandoned house next to their house on the pretense of securing some controlled substances from that house. That through this ruse they were eventually able to get Elizabeth Stallings into the house and that at that time, consistent with the prearranged plan to do so, they proceeded to effectuate a robbery of the food stamps which Elizabeth Stallings had in her possession. Leroy McNeil took the food stamps from her; he beat her; he stabbed her; took her clothes off and that after securing a rifle, he shot her in the head and killed her. Now this was some of the evidence offered by the State as to that

case tends to show.

The State additionally, as to that case and to the case involving the murder of Deborah Fore, at the sentencing hearing offered evidence tending to show that on the 18th day of May, 1977, Leroy McNeil entered a plea of guilty and was therefore convicted of the voluntary manslaughter of Cynthia Latham McNeil.

As to the case of State of North Carolina versus Leroy McNeil, involving the first degree murder of Deborah Fore, the State offered evidence tending to show that on or about the 10th day of April of 1983, the defendant Leroy McNeil discussed with his wife the fact that they needed money. That pursuant to that, he called Deborah Fore, an individual that he thought might have some money, on the pretense of taking her out on a date. Eventually, the defendant and Penny McNeil went to Deborah Fore's house. She got in the car with them, needing a ride to the store. That they drove around, finally driving to a secluded area of Wake County. At that time the defendant indicated that a tire on his car was going flat, as one actually was. He went back to the back of his car, opened the trunk. Prior to doing so, he had taken a pistol out from under the seat and armed himself with it. Eventually Deborah Fore got out of the car and came back to where the defendant was to see what the problem was with the tire. The defendant thereafter shot

Deborah Fore in the head with the pistol, causing her death. After the defendant shot Deborah Fore, he removed from her person a small amount of U.S. currency, her keys and other items of personal property.

The defendant, as to each of these cases, has offered evidence tending to show that the defendant had been drinking heavily prior to the incident involving Elizabeth Stallings and prior to the incident involving Deborah Fore. The defendant was, in fact, an alcoholic, a habitual drinker and that his drinking impaired his judgment and his inhibitions and impaired his capacity to recognize the criminality of either of the acts.

The defendant further offered evidence tending to show that the defendant is an individual with a relatively low IQ; in fact, is borderline mentally retarded. That after his arrest and at his specific request he met with law enforcement officers and made a full and complete statement concerning all of these incidents.

Further, the defendant offered evidence tending to show that the defendant had been employed with a construction company here in Wake County and that he worked hard at that job. That even though he had some absentee problems related to his drinking, that he was a hard-working employee of that construction company.

This is what some of the evidence offered by the

defendant as to each of these cases and in this sentencing hearing tends to show. Both as to the evidence offered by the State and the evidence offered by the defendant, I have summarized the evidence only very briefly. You should consider all of the evidence and if your recollection differs from mine, rely upon your own.

Additionally, I have only related what the evidence for the State and the evidence for the defendants tends to show, not what it does show, because, you, ladies and gentlemen, are the finders of the fact and, therefore, only you determine what the evidence does show.

So I charge that for you to recommend that this defendant be sentenced to death in either, in either the Stallings case or the Fore case, the State must prove three things from the evidence beyond a reasonable doubt. Now a reasonable doubt is a doubt based on reason and common sense, arising out of some or all of the evidence that has been presented, or lack or insufficiency of the evidence, as the case may be. Proof beyond a reasonable doubt is proof that fully satisfies or entirely convinces you of each of the following things:

First, that one or more aggravating circumstances exist.

Two, that any mitigating circumstances you have found are insufficient to outweigh any aggravating

circumstances you have found.

Third, that any aggravating circumstances you have found are sufficiently substantial to call for the imposition of the death penalty when considered with any mitigating circumstances that you have found.

Again, it will be your responsibility to consider the aggravating and the mitigating circumstances separately as to each case and to make a separate decision as to each case. If in either case or in both you unanimously find all three of these things beyond a reasonable doubt, it would be your duty to recommend that this defendant, Leroy McNeil, be sentenced to death. If you do not so find or if you have a reasonable doubt as to one or more of these things, in either case, then it would be your duty to recommend that the defendant be sentenced to life imprisonment in that case.

When you retire to deliberate your recommendations as to punishment, you will take with you two forms, one for each case, entitled "Issues and Recommendations as to Punishment." This form contains a written list of four issues relating to aggravating and mitigating circumstances. I will now take up these four issues in each case with you in greater detail, one by one, to enable you to follow me more easily. The bailiff will now give each of you a copy of two forms, each entitled "Issues and Recommendations as

to Punishment." One form relates to the Deborah Fore case and that is indicated in the caption at the top of that form. The other form relates to the Elizabeth Stallings case and that is indicated in the caption at the top of that form. Mr. Sheriff, will you distribute one copy of these to each juror. Ladies and gentlemen, please do not read ahead in the form, simply follow them with me as I go through them.

Issue: Number One in the case involving the first degree murder of Elizabeth Faye Stallings reads as follows:

Do you unanimously find from the evidence, beyond a reasonable doubt, the existence of one or more of the following aggravating circumstances in the case, in the murder involving Elizabeth Stallings?

In the case involving first degree murder of Deborah Fore would read as follows:

Do you unanimously find from the evidence, beyond a reasonable doubt, the existence of one or more of the following aggravating circumstances?

In the case involving the first degree murder of Elizabeth Faye Stallings, three possible aggravating circumstances are listed on the form and you should consider each of them before you answer Issue Number One. Two possible aggravating circumstances are listed on the form in the case involving Deborah Fore and you should consider each of them before you answer Issue Number One.

PRICE CO., BAYONNE, N.J. 07002 FORM 2004

Now the State must prove from the evidence beyond a reasonable doubt the existence of any aggravating circumstance, and, before you may find any aggravating circumstance, you must agree unanimously that it has been so proven. An aggravating circumstance is a group of facts which tend to make a specific murder particularly deserving of the maximum punishment prescribed by law, that being death. Our law identifies the aggravating circumstances which might justify a sentence of death. Only those circumstances identified by statute may be considered by you as an aggravating, as aggravating circumstances. Under the evidence in the case involving the first degree murder of Elizabeth Stallings, three possible aggravating circumstances may be considered. Under the evidence in the case involving the first degree murder of Deborah Fore, two possible aggravating circumstances may be considered. The following are the aggravating circumstances which may be applied to these cases.

First, the first aggravating circumstance, if it applies at all, would under the evidence in this case apply in both cases. It reads as follows:

First, has Leroy McNeil been previously convicted of a felony involving the use of violence to the person? [Now voluntary manslaughter is by definition a felony involving the use of violence to the person.] Exception No. 85 - Voluntary manslaughter

is defined as the intentional and unlawful killing of a human being without malice, without premeditation and without deliberation.

A person has been previously convicted, if he has been convicted and not merely charged and if his conviction is based upon conduct which occurred before the events out of which these murders arose.

So if you find from the evidence beyond a reasonable doubt that on or about the 18th day of May, 1977, in Mecklenburg County, Leroy McNeil had been convicted of voluntary manslaughter of Cynthia Latham McNeil and that he, Leroy McNeil, killed Elizabeth Stallings and Deborah Fore after he committed this voluntary manslaughter, then you would find this aggravating circumstance and would so indicate by having your foreperson write "Yes" in the space after this aggravating circumstance on the Issues and Recmendation Form of the Stallings case and the Fore case as appropriate.

If you do not so find or have a reasonable doubt as to one or more of these things, then you will not find this aggravating circumstance and will so indicate by having your foreperson write "No" in that space in the Stallings case and in the Fore case as appropriate.

Second, was the murder, was this murder of Elizabeth Faye Stallings committed by Leroy McNeil while Leroy

PENGAD CO., BAYONNE, N.J. 07002 FORM 2004

McNeil was engaged in the commission of robbery with a firearm?

Additionally, second, was this murder committed by Leroy McNeil while Leroy McNeil was engaged in the commission of robbery with a firearm as related to the murder of Deborah Fore?

As to this potential aggravating circumstance, you should consider the evidence separately in each of the two cases and you should focus separately on this issue in each of the two cases and your answer would be based upon your evaluation of the evidence as it relates to each of the two cases separately.

Robbery with a firearm is the taking and carrying away of any personal property of another from her person or in her presence without her consent by endangering or threatening a person with a firearm, with the intent to deprive her of the use of property permanently, the taker knowing that he was not entitled to take that property.

[If you find from the evidence beyond a reasonable doubt that Leroy McNeil killed Elizabeth Stallings--excuse me, that when Leroy McNeil killed Elizabeth Stallings, Leroy McNeil was taking and carrying away a quantity of food stamps from the person and presence of Elizabeth Stallings without her voluntary consent, by endangering or threatening Elizabeth Stallings with a firearm, Leroy McNeil knowing that he was

not entitled to take these food stamps and intending at that time to deprive Elizabeth Stallings of their use permanently, then you would find this aggravating circumstance in the Elizabeth Stallings case. You would so indicate by having your foreperson write "Yes" in the space after this aggravating circumstance on the Issues and Recommendations Form of the Elizabeth Stallings case.

If you do not so find or have a reasonable doubt as to one or more of these things, then you will not find this aggravating circumstance and will so indicate by having your foreperson write "No" in that space.

Turning now to the case involving the first degree murder of Deborah Fore. If you find from the evidence beyond a reasonable doubt when Leroy McNeil killed Deborah Fore, Leroy McNeil was taking and carrying away U.S. currency, keys and other items of personal property from the person and presence of Deborah Fore without her consent, by endangering or threatening Deborah Fore with a firearm, specifically a pistol, Leroy McNeil knowing that he was not entitled to take this personal property and intending at that time to deprive Deborah Fore of the use of the property permanently, then you will find this aggravating circumstance and would so indicate by having your foreperson write "Yes" in the space provided after this aggravating circumstance on Issues and Recommendations Form in the

Deborah Fore case.] Exception No. -87-

If you do not so find or have a reasonable doubt as to one or more of these things, then you will not find this aggravating circumstance and will so indicate by having your foreperson write "No" in that space in the Deborah Fore case.

Only in the Elizabeth Stallings case there is a third aggravating circumstance, third potential aggravating circumstance for your consideration. It reads as follows:

[Three, was the murder of Elizabeth Stallings especially heinous, atrocious or cruel?

Again this aggravating circumstance may not be considered in the Deborah Fore case.

Okay. In this context heinous means extremely wicked or shockingly evil; atrocious means outrageously wicked and vile; and cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. However, it is not enough that this murder of Elizabeth Stallings be heinous, atrocious or cruel as those terms have just been defined. This murder must have been especially heinous, atrocious or cruel, and not every murder is especially so. For this murder to have been especially heinous, atrocious or cruel, any brutality which was involved in it must have exceeded that which is normally present in any killing. This murder

must have been a murder without conscience or pitiless crime which was unnecessarily tortuous to the victim, Elizabeth Stallings. If you find from the evidence beyond a reasonable doubt that this murder of Elizabeth Stallings was especially heinous, atrocious or cruel, you would find this aggravating circumstance in that case and would so indicate by having your foreperson write "Yes" in the space after this aggravating circumstance on the Issues and Recommendations Form of Elizabeth Stallings.] Exception No. 88

If you do not so find or have a reasonable doubt as to one or more of these things, then you will not find this aggravating circumstance in the Elizabeth Stallings case and will so indicate by having your foreperson write "No" in that space.

Now if you unanimously find from the evidence, beyond a reasonable doubt, one or more, that one or more of these aggravating circumstances existed in a particular case and have indicated by writing "Yes" in the space after one or more of them on the Issues and Recommendations Form of that particular case, then you would answer Issue One "Yes" in that case.

If you do not unanimously find from the evidence, beyond a reasonable doubt, that at least one of these aggravating circumstances existed and if you have so indicated by writing "No" in the space after every one of the

PEGASO CO., BAYONNE, N.J. 07002 FORM 7750

potential aggravating circumstances for that particular case, then you would answer Issue One "No" in that case.

If you answer Issue One "No" in a particular case, you would skip Issues Two, Three and you must recommend that this defendant be sentenced to life imprisonment.

If you answer Issue One "Yes" in a particular case then you would consider Issue Two.

Issue Two reads as follows:

Do you find from the evidence the existence of one or more of the following mitigating circumstances?

Now in each of the two cases six possible mitigating circumstances are listed on the form. You should consider each of them before answering Issue Two in each case.

A mitigating circumstance is a fact or group of facts which do not constitute a justification or excuse for a killing, or reduce it to a lesser degree of crime than first degree murder, but which may be considered as extenuating or reducing the moral culpability of the killing or making it less deserving of extreme punishment than other first degree murders. Our law identifies several possible mitigating circumstances. However, in considering Issue Two, it would be your duty to consider as a mitigating circumstance any aspect of the defendant's character or record and any of the circumstances of a particular murder that the

defendant contends is a basis for a sentence less than death, and any other circumstances arising from the evidence that you deem to have mitigating value.

The defendant has the burden of proving to you that a given mitigating circumstance exists. The existence of any mitigating circumstance must be established by a preponderance of the evidence, that is, the evidence taken as a whole must satisfy you, not beyond a reasonable doubt, but simply satisfy you that any mitigating circumstance exists. If the evidence satisfies you that a mitigating circumstance exists, you would find that circumstance; if not, you would not find it. In either event, you would move on to consider the other mitigating circumstances and continue in like manner until you have considered all of the mitigating circumstances listed on the form and any others which you deem to have mitigating value.

Now it is your duty to consider the following mitigating circumstances and any others which you find from the evidence.

First--and this would apply, if at all, in each case. First, consider whether Leroy McNeil has no significant history of prior criminal activity. Significant means important or notable. Whether any history of prior criminal activity is significant is for you to determine from all of the facts and circumstances which you find from the evidence.

However, you should not determine whether it is significant only on the basis of the number of convictions, if any, in the defendant's record. Yet you should consider the nature and quality of the defendant's history, if any, in determining whether it is significant. You would find this mitigating circumstance if you find that the defendant Leroy McNeil has only been convicted of voluntary manslaughter and that this is not a significant history of prior criminal activity.

Now the second possible mitigating circumstance, and you will have to, as to this mitigating circumstance, focus on the evidence as related to each of the two cases and such of the evidence that might relate to both of the cases, but you should consider this potential mitigating circumstance separately in each of the two cases. This potential mitigating circumstance reads as follows:

Consider whether the capacity of Leroy McNeil to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired.

A person's capacity to appreciate the criminality of his conduct or to conform his conduct to the law is not the same as his ability to know right from wrong generally, or to know that what he is doing at a given time is killing or that such killing is wrong. A person may indeed know that a killing is wrong and still not appreciate its

wrongfulness because he does not fully comprehend or is not fully sensible to what he is doing or how wrong it is. Further, for this mitigating circumstance to exist, the defendant's capacity to appreciate does not need to have been totally obliterated. It is enough that it was lessened or diminished. Finally, this mitigating circumstance would exist, even if the defendant did appreciate the criminality of his conduct, if his capacity to conform to the law was impaired, since a person may appreciate that his killing is wrong and still lack the capacity to refrain from doing it. Again, the defendant need not wholly lack all capacity to conform. It is enough that such capacity as he might otherwise have had in the absence of voluntary intoxication is lessened or diminished because of such voluntary intoxication.

You would find this mitigating circumstance in the case involving the first degree murder of Elizabeth Stallings if you find that Leroy McNeil had drunk a large quantity of intoxicating liquor prior to the killing of Elizabeth Stallings and that this impaired his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.

You would find this mitigating circumstance in the case involving the first degree murder of Deborah Fore if you find that Leroy McNeil had drunk a large quantity of

PENSAD CO., BAYONNE, N.J. 07002 FORM P***

intoxicating liquor prior to the killing of Deborah Fore and that this impaired his capacity to appreciate the criminality of his conduct or to conform his conduct to the law.

Now the third possible mitigating factor or circumstance which you should consider is this:

That Leroy McNeil confessed to the crime and did so shortly after the crimes were committed.

Now this would apply, if at all, equally in both cases. If you find from the evidence that the defendant confessed to these crimes and did so shortly after the crimes were committed and that this has mitigating value, then you would find this mitigating circumstance.

Fourth, the defendant Leroy McNeil has an IQ of 78 and is borderline mentally retarded.

This mitigating circumstance would apply, if at all, in both cases. If you find from the evidence, based upon the preponderance of the evidence, that the defendant has an IQ of 78 or a low IQ and is borderline mentally retarded and if you find that this has mitigating value, then you would find this mitigating circumstance.

Fifth, the defendant Leroy McNeil had been a good and useful employee for Rea Construction Company prior to the events of April, 1983.

This would apply, if at all, to both of the cases.

If you find from the evidence and by the preponderance of the evidence that Leroy McNeil had been a good and useful employee for Rea Construction Company prior to April, 1983, and if you find that this has mitigating value, then you would find this mitigating circumstance.

Six, finally, you may consider any other circumstance or circumstances arising from the evidence which you deem to have mitigating value, including any aspect of the defendant's character or reputation or record, or any of the circumstances of this murder which you deem to have mitigating value.

If in a particular case you find one or more mitigating circumstances, then you would answer Issue Two "Yes" for that case. If you do not find at least one mitigating circumstance from the evidence, then you would answer Issue Two "No" in that case. Again, you are to consider each of the cases separately. If you answer Issue Two "Yes," then you must consider Issue Three for that case. If you answer Issue Two "No," in one or both of the cases, then as to the case you answer Issue Three "No"--excuse me, as to the case that you answer Issue Two "No," you would skip Issue Three and answer Issue Four.

Issue Three reads:

Do you unanimously find beyond a reasonable doubt that the mitigating circumstance or circumstances found by

PENCAD CO., BAYONNE, N.J. 07002 FORM 1-94

you is, or are, insufficient to outweigh the aggravating circumstance or circumstances found by you?

You will consider this issue separately in each case. You will consider it separately in the Elizabeth Stallings case and in the Deborah Fore case. If you find from the evidence one or more mitigating circumstances in one or the other, or both cases, you must weigh the aggravating circumstances found by you in that particular case against the mitigating circumstances found by you in that particular case. In doing so, you are the sole judges of the weight to be given to any individual circumstance which you find, whether aggravating or mitigating. You should not merely add up the number of aggravating circumstances and mitigating circumstances. Rather, you must decide from all the evidence what value to give to each circumstance. Then you must weigh the aggravating circumstances of that particular case, so valued, against the mitigating circumstances of that particular case, so valued, and determine whether the mitigating circumstances outweigh the aggravating circumstances.

In each case if you unanimously find beyond a reasonable doubt the mitigating circumstances found by you in that particular case are insufficient to outweigh the aggravating circumstances found by you in that particular case, you would answer Issue Three "Yes" in that case. If

you do not so find or have a reasonable doubt as to whether they do, you would answer Issue Three "No" in that case. If you answer Issue Three "No" in any case, in either of the two cases, as to that case, it would be your duty to recommend that the defendant be sentenced to life imprisonment. If you answer Issue Three "Yes" in a particular case, then it would be your responsibility to consider Issue Four in that particular case.

Issue Four reads as follows:

Do you unanimously find beyond a reasonable doubt that the aggravating circumstance or circumstances found by you is, or are, sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstance or circumstances found by you?

If you reach Issue Four in either or both cases, you should consider it separately as to the Stallings case and as to the Fore case. In deciding this issue, you are not to consider the aggravating circumstances standing alone. You must consider them in connection with any mitigating circumstances found by you in a particular case. After considering the totality of the aggravating and mitigating circumstances, you must be convinced beyond a reasonable doubt that the imposition of the death penalty is justified and appropriate in that case before you can answer the issue "Yes." In doing so, you are not applying a

PEIRCE CO., BAYONNE, N.J. 07002 FORM 24

mathematical formula. For example, three circumstances of one kind do not automatically and of necessity outweigh one circumstance of another kind. The number of circumstances found is only one consideration in determining which circumstances outweigh others. You may very properly emphasize one circumstance more than another in a particular case. You must consider the relative substantiality and persuasiveness of the existing aggravating and mitigating circumstances in making this determination. You, the jury, must determine how compelling and persuasive the totality of the aggravating circumstances are when compared with the totality of the mitigating circumstances found by you. After so doing, if you are satisfied beyond a reasonable doubt that the aggravating circumstances found by you are sufficiently substantial to call for the death penalty, then it would be your duty to answer that issue "Yes" in that particular case. If you are not so satisfied or have a reasonable doubt, then it would be your duty to answer the issue "No" in that particular case.

In the event that you do not find existence of any mitigating circumstances, you must still answer this issue. In such case, you must determine whether the aggravating circumstances found by you are of such value, weight, importance, consequence, or significance as to be sufficiently substantial to call for the imposition of the death

PENGAD CO., BAYONNE, N.J. 07002 FORM 2048

penalty. Substantial circumstances may be contrasted with circumstances that are enuous, flimsy, abstract, imaginary, deceptive, or negligible.

Substantial means having substance or weight, important, significant or momentous. Aggravating circumstances may exist in a particular case and still not be sufficiently substantial to call for the death penalty. Therefore, it is not enough for the State to prove from the evidence beyond a reasonable doubt the existence of one or more aggravating circumstances. It must also prove beyond a reasonable doubt that such aggravating circumstances are sufficiently substantial to call for the death penalty, and before you may answer Issue Four "Yes" in either case, you must agree unanimously that they are.

If you answer Issue Four "No" in a particular case, you must recommend that this defendant be sentenced to life imprisonment. If you answer Issue Four "Yes" in a particular case, it would be your duty to recommend that the defendant be sentenced to death in that particular case.

Now ladies and gentlemen, I've got just a little bit more instructions, only about a minute or two, but--and I think there will be time for you to deliberate, at least briefly this afternoon. I'm going to take a recess now until 4:30, at which time I will complete the instructions and let you begin your deliberations.

PEGGAD CO., BATONNE, N.J. 07002 FORM 7004

RECESS.

COURT: Members of the jury, you have heard the evidence and the arguments of counsel for the State and for the defendant. I have not summarized all of the evidence, but it is your duty to recall and to consider all the evidence, whether it's been called to your attention or not. If your recollection of the evidence differs from mine, from the prosecutor, the defense attorney, you are to rely solely upon your recollection of the evidence in your consideration. I have not reviewed all the contentions of the State or of the defendant, but it is your duty to consider not only all the evidence, but also to consider all the arguments, contentions and positions urged by the State's attorneys and by the defendant's attorneys in their final speeches to you, and any other contention that arises from the evidence, whether it's called to your attention or not, and to weigh all this in the light of your common sense, and to make your recommendation as to punishment.

The law, as certainly it should, requires the Presiding Judge to be completely and totally impartial. You are not to draw any inference from any ruling that I have made, or any inflection in my voice or expression on my face, or anything else that I have said or done during this trial, that I either have an opinion or have intimated an opinion as to whether any part of the evidence should be

PIERCE CO., BAYONNE, N.J. 07002 FORM 1004

believed or disbelieved, as to whether any of the aggravating or mitigating circumstances has been proved or disproved, or as to what your recommendation in either case ought to be. It is your exclusive providence to find the true facts of these cases and to make your recommendation reflecting the truth as you find it to be.

Now ladies and gentlemen, when you retire you should select a foreperson. You may select the same foreperson that you selected in the guilt phase; however, you are not obliged to do so. Your decision, your answers to any of the issues as to your final recommendation must be unanimous, all twelve of you agree.

Now when you retire, I'm going to ask that you pass up your copies of the issue sheets to the bailiff. When you first retire please do not begin your deliberations, simply select your foreperson. When you receive the issues and recommendation as to punishment forms in the two cases, then you may begin your deliberations. When you have answered the forms consistent with the instructions that I have given you and when you have made a recommendation based upon your answers to the issues, your foreperson has answered either all the issues or such answers that are appropriate based upon my instructions in giving your answers to the issues, your foreperson has filled in, dated and signed the recommendation as to punishment in each case,

PENGAD CO., BAYONNE, N.J. 07002

then you will have completed your deliberations.

Now again, if you have questions during the deliberative process, the procedure is for all of you to return to the courtroom and your foreperson ask the question on behalf of the jury.

At this time I'm in a position to excuse the two alternate jurors with my very great thanks for your service in this case. At this time the two alternate jurors are excused. This would complete your jury service. I do not believe that the jury clerk is here this afternoon, so it will not be necessary for you to check out with her, but this will complete your jury service and I thank each of you very much. Thank you.

Okay. Ladies and gentlemen, at this time you may retire and when you receive the issue sheet begin your deliberations. Please give your copies of the issue sheets to the bailiff as you retire to the jury room.

JURY RETIRES. (4:26 P.M.)

COURT: At this proceeding outside the presence of the jury, the Court inquires of the State, if the State has any request for additional instructions or any objections to the instructions.

MR. STEPHENS: The State has no request for additional instructions. The State has no objections to the jury instructions.

PERCAN CO., BATON ROUGE, N.J. 07002 FORM 2000

COURT: The Court inquires of the defendant, if it has requests for additional instructions.

MR. GAMMON: No, Your Honor.

COURT: In light of that, I'm going to give the Recommendations for Punishment Form to the bailiff and ask him to give it to the jury for them to begin their deliberations.

JURY RETURNS. (5:02 P.M.)

COURT: Ladies and gentlemen, having gone over the appointed time yesterday, I think we'll stop on time today. We're going to recess until 9:30 tomorrow morning. During the overnight recess it remains critically important that you not talk to anyone about this case, that you not talk to members of your family about it. It remains critically important that you avoid any media exposure to any aspect. I thank you for your attention throughout the course of the day and particularly thank you for your attention to my instructions to you. At this time take a recess.

RECESS.

Friday, May 11, 1984. (9:30 A.M.)

COURT: Ladies and gentlemen, at this time I would ask that you again retire and continue your deliberations. Thank you very much.

JURY RETIRES.

PENROD CO., BAYONNE, N.J. 07002 FORM 9

JURY ABSENT. (10:38 A.M.)

MR. BLACKBURN: We note the jury has now been out for a little more than perhaps an hour and a half, approximately an hour and a half, including that time yesterday. For the record we would like to ask--a reasonable time has been sufficient on the deliberation for life or death and we would ask that you impose a life sentence in this case.

Exception No. 87

COURT: That motion is denied. Any additional matters at this time?

1

MR. BLACKBURN: I don't think, Your Honor.

JURY RETURNS. (11:05 A.M.)

COURT: Okay. Ladies and gentlemen, as per your request, take a fifteen minute recess until about twenty-five minutes after 11:00 by the clock on this courtroom. Throughout the time you are deliberating in this case, at any point you wish to take a break, if you will follow the same procedure, additionally when you'd like to take a recess for lunch, if you will follow the same procedure also indicating how long you'd like to recess for lunch. I'd like during this period to sort of let you set your own work schedule.

RECESS.

COURT: Okay. Ladies and gentlemen, if you would, again retire and continue your deliberations.

JURY RETIRES. (11:25 A.M.)

MR. BLACKBURN: Judge, while you're here, let's us go ahead. I guess it's been now, I don't know the exact time, but it's been over two hours I know since the jury went out and for that reason they have obviously been deliberating, starting yesterday afternoon at 4:30, we would make a motion--that a reasonable time has passed, and we would make a motion that you impose a life sentence on Leroy McNeil.

Exception No. 90

COURT: That motion is denied.

(12:54 P.M.)

JURY ABSENT.

MR. BLACKBURN: Judge, it has now been, I think, around three and a half hours, maybe a little more, three and a half hours since the jury went out to begin deliberating yesterday afternoon at 4:30, not including the break that they have and again we would certainly say enough reasonable time has passed and we would request that you impose life imprisonment.

COURT: Do you wish to be heard?

MR. STEPHENS: No, sir, not yet.

COURT: The motion is denied. Exception No. 91

JURY RETURNS. (1:00 o'clock P.M.)

COURT: Okay. Ladies and gentlemen, as per your request, we're going to take a recess for lunch until 2:15 by the clock in this courtroom. During the luncheon recess

if some of you are together or all of you were together, again it would not be appropriate for you to talk about this case among yourselves. Please return to the seats that you now occupy at 2:15. Please recall and continue to abide by all the instructions I have given you concerning your conduct as jurors.

RECESS.

COURT: Okay. Ladies and gentlemen, at this time, if you would, retire and continue your deliberations.

JURY RETIRES. (2:17 P.M.)

MR. BLACKBURN: Judge, while you're on the bench, I would renew my motion I made before lunch.

COURT: That is denied. Exception No. 92

(3:30 P.M.)

COURT: The jury has requested a break. I will hear your motion first.

MR. BLACKBURN: Thank you, Your Honor. Judge, by my calculations it's been approximately now four hours and forty-five minutes since they began deliberating yesterday afternoon and again we would renew our motion and ask that certainly sufficient time has passed and move again that a reasonable time has passed and that the life sentence be imposed.

COURT: Again that is denied. Exception No. 93

JURY RETURNS.

COURT: Ladies and gentlemen, it's my understanding at this time you'd like a ten minute break. We'll take a recess until 4:00 o'clock by the clock in this courtroom. RECESS.

COURT: Ladies and gentlemen, before you resume your deliberations, I want to go over a couple of matters with the foreperson of the jury. Now as I indicated in my instructions to you, of course your answers to each of the issues in each case must be unanimous in your recommendation in each case. It must be a unanimous recommendation. Now I'm going to ask the foreperson of the jury some questions. Please listen very carefully to the question I ask. Let me fully complete the question before you answer it and only answer the very specific question that I ask. In the case State of North Carolina versus Leroy McNeil, involving the first degree murder of Elizabeth Faye Stallings, have you in your deliberations in that case reached Issue Number Four? Please answer either yes or no.

FOREMAN: No:

COURT: In your deliberations in the case involving State of North Carolina versus Leroy McNeil,involving the first degree murder of Deborah Fore, in your deliberations in that case have you reached Issue Number Four, yes or no?

FOREPERSON: No.

COURT: Okay.

MR. STEPHENS: Judge, can we approach the bench?

COURT: Yes.

When I indicate that you have reached Issue Number Four, I do not mean if you have decided unanimously your answer to Issue Number Four. What I mean have you unanimously decided such other issues that you are not considering Issue Number Four. Would that explanation change your answer to either case?

FOREMAN: No, sir, it would not.

JURY RETIRES. (4:49 P.M.)

MR. BLACKBURN: Judge, if I could please, I would like for the record to renew my motion.

COURT: That is denied.

(4:54 P.M.)

COURT: Court will be back in session.

MR. BLACKBURN: Thank you, Judge. Judge, as you know, we have made a motion several times prior to this time concerning the fact we believe a reasonable time has passed and life sentence should be imposed. We have now reached almost the end of the workday. They have been out all day long, except for lunch and except for lunch and breaks, and I believe, and of course, they went out yesterday afternoon at 4:30. I don't know precisely how much time is necessary to reach a decision, but I do know that I

think sufficient time has passed now. A reasonable time has passed with the questions to be determined by the jury as to life and death and that as time goes by, it becomes increasingly difficult for the jury to reach its decision. One of the reasons I want to make the motion now as strongly as I can is because I recognize that it may be possible, may be necessary if you deny my motion that the jury recess over the weekend and come back on Monday morning. If that should occur, that bothers me because, of course, this has been a highly publicized trial, as you know. It's in the newspapers constantly. It's on the radio constantly. It's on the television news constantly. Having watched some of that television news, I know as recently as last night matters not permitted before the jury in this case have come to the public's attention. There's such a great risk that prejudice could come to Mr. McNeil in these two cases if the matter was not simply stopped at this point, because of the great danger over the weekend, additional publicity. If they find out, for example, he's been charged with a third crime, though not proved, that could be the sort of thing to tip the case one way or the other, though we would never know it, and this jury has had somewhere over six hours, or approximately six hours to deliberate, which I think is plenty of time for them to make a decision, if, in fact, they were going to make a decision. For that reason,

PEGGED CO., BAYONNE, N.J. 07002

I would urge, particularly at this time, as strongly as possible that you strongly consider imposing a life sentence.

COURT: Thank you, Mr. Blackburn. Mr. Stephens, do you wish to be heard?

MR. STEPHENS: No, sir. Exception No. 94

COURT: The defendant's motion is denied. 1 Mr. Sheriff, if you would, ask the jurors to come out.

JURY RETURNS. (5:02 P.M.)

Ladies and gentlemen, it's approximately 5:00 o'clock. In just a moment I'm going to ask that you go back into your jury deliberation room and I'm going to let you determine basically one of two options. If you would like to continue your deliberations today for some additional period after 5:00 o'clock, with the understanding that at whatever time you would like as a group to stop for the day, you would just need to send me a note and do so; then that would be one of your options. The other option would be that we just go ahead and recess at the normal time to recess and that you would return at 9:30 Monday morning to continue your deliberations. If you wanted to continue your deliberations today and you were not able to complete your deliberations, at such time as you wanted to stop for the day, then again you would come back at 9:30 on Monday morning and continue your deliberations. What I would like for you to do at this time is to go back and make that determination.

Then if you would give the bailiff a note as you have previously as to which of the two options you would prefer, and it does not make a bit of difference to me, it's whichever option you would prefer, then your wishes will be complied with and either continue deliberations until you indicate that you are ready to stop or I'll bring you out and with some additional instructions we'll recess for the weekend. Thank you very much.

JURY RETIRES.

JURY RETURNS. (5:05 P.M.)

COURT: Okay. Ladies and gentlemen, consistent with your request, we're going to recess at this time until Monday morning. One thing that I did not think about originally, normally on Mondays Court begins at 10:00 o'clock and there will be on Monday a fairly large number of people who will be planning to come to the courtroom for other purposes at 10:00 o'clock and it might create some confusion if we started this matter at 9:30. With your permission, we'll recess until 10:00 o'clock on Monday morning. When you return on Monday there will probably be a significant number of people here in the courtroom. They will be here on matters unrelated to this case and you will begin your deliberations before we begin any other business. If you would return to the seats you now occupy at 10:00 o'clock on Monday morning, at that time you will continue

your deliberations. Now before you leave today, I want to take just a moment to emphasize something that I have talked about a number of times in the course of this trial, but I think it's so important that with your indulgence I'm going to just take an additional moment to talk about it. This case has received and will receive over the weekend a significant amount of coverage in the local media, in the newspapers, on the radio, on television. It is of the utmost importance that you not expose yourself to any of that. I can not emphasize that too strongly. I'm going to ask each of you to make a very very special effort to not inadvertently be exposed to any newspaper, radio, or television coverage of this trial. I know that none of you would intentionally do that, but what I'm trying to emphasize is that it will be difficult, it's going to take a special effort. I'm going to ask that you not look at any local television news programs over the weekend, do not read any newspaper over the weekend, do not listen to the radio over the weekend. I'm asking you to take these very special precautions in lieu of the alternative, which would be to sequester you over the weekend. I know none of you would want that and I wouldn't want to do that, but to avoid that, I'm going to ask that you make this special effort in not reading any newspapers, not listening to the radio and not watching any television news programs.

Additionally, all of the other instructions that I have given you previously,of course, still apply. It would not be appropriate for any of you to talk about any aspect of this case among yourselves over the weekend. I again particularly emphasize that you not talk to any members of your family about this case and I recognize the very special temptation or inclination that there may be to do that. So I ask you with all the fervor that I can that you not do that. I thank each of you for your conscienrious effort in this trial and to these deliberations to this point. At this time we'll take a recess until 10:00 o'clock Monday morning. Please return to the seats that you now occupy at that time and then your deliberations in this case will continue.

* * * * * * * * * * * * *

COURT: Ladies and gentlemen of the jury, if you would again, retire and continue your deliberations.

JURY RETIRES TO CONTINUE DELIBERATIONS AT 10:05 A. M.

JURY KNOCKS ON DOOR AT 10:25 A. M.

JURY RETURNS TO JURYBOX

COURT: Ladies and gentlemen, at this time I am informed that the jury has decisions in both cases in the case of the State of North Carolina, versus, Leroy McNeil. At this time, anyone who -- I'm going to excuse everyone who is not connected with the Leroy McNeil Case, until fifteen minutes until eleven by the clock in this courtroom. If you are not here, either connected with the Leroy McNeil case or as a spectator in that case, or if you are here for other business, you are excused at this time until fifteen minutes until eleven.

COURT: Bring the defendant in.

DEFENDANT ENTERS COURTROOM

COURT: Mister sheriff, if you will ask the jurors to come out and take the seats they occupied during the trial..

JURY RETURNS TO JURYBOX

COURT: Ladies and gentlemen, if in each of the two cases you have unanimously answered each of the issues or such of the issues as constitute a recommendation, and have made a recommendation in each of the two cases based upon your unanimous answers to the issues and you have unanimously made a recommendation; and if the foreperson of the

PIERCE CO., RALEIGH, N.C. 27609 - 787-

jury has filled in, dated and signed each of the two issues and recommendations on the forms; then I would ask the foreperson of the jury to please hand the issues and recommendation forms to the baliff, who will hand it to the Court.

(NOTE: Request of Court complied with)

COURT: The foreperson of the jury will please stand.

CLERK:: Ladies and gentlemen of the jury, you have returned the following answers to the issues and recommendation as to punishment. State of North Carolina versus Leroy McNeil, case of Elizabeth Faye Stallings, you have answered Issue No. 1, do you unanimously find the evidence beyond a reasonable doubt the existence of one or more of the following aggravating circumstances; answer, yes, had Leroy McNeil been previously convicted of a felony involving the use of violence to the person; answer, yes; was this murder committed while Leroy McNeil was engaged in the commission of robbery with a firearm; answer, yes, was this murder especially heinous, atrocious or cruel; answer, yes. You have answered the second issue, do you find from the evidence the existence of one or more of the following mitigating circumstances; answer, yes. You have answered the third issue, do you unanimously find beyond a reasonable doubt that the mitigating circumstance or circumstances found by you is or are insufficient to outweigh the aggravating circumstance or circumstances

found by you; answer, yes. Issue Four, do you unanimously find beyond a reasonable doubt that the aggravating circumstance or circumstances found by you is or are sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstance or circumstances found by you, answer, yes.

Your recommendation as to punishment. We the jury unanimously recommend that the defendant, Leroy McNeil, be sentenced to death; this the 14th day of May 1984; signed Michael S. Hodges, Foreman of the Jury.

Are these your answers and is this your recommendation

FOREMAN: Yes it is.

CLERK: So say you all?

JURORS: "Yes".

CLERK: You ahve answered the issues and recommendation as to the punishment in the case of State of North Carolina versus Leroy McNeil in the case of Deborah Jean Four. Issue No. 1, do you unanimously find from the evidence beyond a reasonable doubt the existence of one or more of the following aggravating circumstances; answer, yes, had Leroy McNeil been previously convicted of a felony involving the use of violence to the person; answer, yes; two, was this murder committed while Leroy McNeil was engaged in the commission of robbery with a firearm; answer, yes.

Issue 2, do you find from the evidence the existence of one or more of the following mitigating circumstances; answer, yes. Issue 3, do you unanimously find beyond a reasonable doubt that the mitigating circumstance or circumstances found by you is or are insufficient to outweigh the aggravating circumstance or circumstances found by you, answer, yes. Issue 4, do you unanimously find beyond a reasonable doubt that the aggravating circumstance or circumstances found by you is or are sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstance or circumstances found by you, answer, yes.

Your recommendation as to punishment. We the jury unanimously recommend that the defendant, Leroy McNeil, be sentenced to death; this the 14th day of May 1984; signed, Michael S. Hodges, Foreman of the Jury.

These are your answers and recomendation so say you all?

JURORS: "Yes".

COURT: Thank you. Any motions requiring continued presence of the jury?

MR. BLACKBURN: Yes sir, your honor. We would ask the jury be polled.

COURT: Ladies and gentlemen, at the request of the defendant, each juror will be polled individually. The procedure for polling the jury will be as follows: In order, begin with the foreperson of the jury, and then proceeding

PINGAD CO., BAYONNE, N.J. 07002 - 7088

APPENDIX E: ISSUES AND RECOMMENDATION AS TO PUNISHMENT FORMS

E F

File # 83-CRS-25606
Film #_____
In the General Court of Justice
Superior Court Division

STATE OF NORTH CAROLINA

COUNTY OF WAKE

STATE OF NORTH CAROLINA	:	
	:	ISSUES AND RECOMMENDATION
VS	:	AS TO PUNISHMENT
	:	
LEROY McNEIL	:	(Elizabeth Faye Stallings case)

ISSUE ONE:
Do you unanimously find from the evidence, beyond a reasonable doubt, the existence of one or more of the following aggravating circumstances?

ANSWER: YES

BEFORE YOU ANSWER ISSUE ONE, CONSIDER EACH OF THE FOLLOWING AGGRAVATING CIRCUMSTANCES IN THE SPACE AFTER EACH AGGRAVATING CIRCUMSTANCE, WRITE "YES," IF YOU UNANIMOUSELY FIND THAT AGGRAVATING CIRCUMSTANCE FROM THE EVIDENCE BEYOND A REASONABLE DOUBT. WRITE, "NO," IF YOU DO NOT FIND THAT AGGRAVATING CIRCUMSTANCE FROM THE EVIDENCE BEYOND A REASONABLE DOUBT.

IF YOU WRITE, "YES," IN ONE OR MORE OF THE SPACES AFTER THE FOLLOWING AGGRAVATING CIRCUMSTANCES, WRITE, "YES," IN THE SPACE AFTER ISSUE ONE AS WELL. IF YOU WRITE, "NO," IN ALL OF THE SPACES AFTER THE FOLLOWING AGGRAVATING CIRCUMSTANCES, WRITE, "NO," IN THE SPACE AFTER ISSUE ONE.

(1) Had Leroy McNeil been previously convicted of a felony involving the use of violence to the person?

ANSWER: YES

(2) Was this murder committed while Leroy McNeil was engaged in the commission of robbery with a firearm?

ANSWER: YES

(3) Was this murder especially heinous, atrocious or cruel?

ANSWER: YES

ISSUE TWO:

Do you find from the evidence the existence of one or more of the following mitigating circumstances?

ANSWER: YES

BEFORE YOU ANSWER ISSUE TWO, CONSIDER EACH OF THE FOLLOWING MITIGATING CIRCUMSTANCES. YOU NEED NOT INDICATE ON THIS FORM WHICH MITIGATING CIRCUMSTANCES YOU DO OR DO NOT FIND.

IF YOU FIND ONE OR MORE OF THE MITIGATING CIRCUMSTANCES FROM THE EVIDENCE WRITE, "YES," IN THE SPACE AFTER ISSUE TWO, ABOVE. IF YOU DO NOT FIND ANY MITIGATING CIRCUMSTANCES, WRITE, "NO," IN THAT SPACE.

1. The defendant Leroy McNeil has no significant history of prior criminal activity.

2. The capacity of Leroy McNeil to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired.

3. That Leroy McNeil confessed to the crime and did so shortly after the crimes were committed.

4. That Leroy McNeil has an I.Q. of 78 and is borderline mentally retarded.

5. The defendant Leroy McNeil had been a good and useful employee for Rea Construction Company prior to the events of April, 1983.

6. Any other circumstance or circumstances arising from the evidence which you the jury deem to have mitigating value.

ISSUE THREE:

Do you unanimously find beyond a reasonable doubt that the mitigating circumstance or circumstances found by you is, or are, insufficient to outweigh the aggravating circumstance or circumstances found by you?

ANSWER: YES

IF YOU ANSWER ISSUE THREE, "NO," INDICATE LIFE IMPRISONMENT UNDER "RECOMMENDATION AS TO PUNISHMENT." IF YOU ANSWER ISSUE THREE, "YES," PROCEED TO ISSUE FOUR.

ISSUE FOUR:

Do you unanimously find beyond a reasonable doubt that the aggravating circumstance or circumstances found by you is, or are, sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstance or circumstances found by you?

ANSWER: YES

IF YOU ANSWER ISSUE FOUR, "NO," INDICATE LIFE IMPRISONMENT UNDER "RECOMMENDATION AS TO PUNISHMENT" ON THE LAST PAGE OF THIS FORM. IF YOU ANSWER ISSUE FOUR "YES," INDICATE DEATH UNDER "RECOMMENDATION AS TO PUNISHMENT."

RECOMMENDATION AS TO PUNISHMENT

INDICATE YOUR RECOMMENDATION AS TO PUNISHMENT BY WRITING "LIFE IMPRISONMENT" OR "DEATH," IN THE BLANK IN THE FOLLOWING SENTENCE:

We, the jury, unanimously recommend that the defendant, Leroy McNeil, be sentenced to DEATH. Exception No. 96

This the 14th day of May 1984.

Michael S. Hodges)Signature)
Foreman of the Jury

File # 83-CRS-23605
Film #_____
In the General Court of Justice
Superior Court Division

STATE OF NORTH CAROLINA

COUNTY OF WAKE

STATE OF NORTH CAROLINA	:	
	:	ISSUES AND RECOMMENDATION
VS	:	AS TO PUNISHMENT
	:	
LEROY McNEIL	:	(Deborah Jean Fore case)

ISSUE ONE:

Do you unanimously find from the evidence, beyond a reasonable doubt, the existence of one or more of the following aggravating circumstances?

ANSWER: YES

BEFORE YOU ANSWER ISSUE ONE, CONSIDER EACH OF THE FOLLOWING AGGRAVATING CIRCUMSTANCES. IN THE SPACE AFTER EACH AGGRAVATING CIRCUMSTANCE, WRITE "YES," IF YOU UNANIMOUSLY FIND THAT AGGRAVATING CIRCUMSTANCE FROM THE EVIDENCE BEYOND A REASONABLE DOUBT. WRITE,"NO," IF YOU DO NOT FIND THAT AGGRAVATING CIRCUMSTANCE FROM THE EVIDENCE BEYOND A REASONABLE DOUBT.

IF YOU WRITE, "YES," IN ONE OR MORE OF THE SPACES AFTER THE FOLLOWING AGGRAVATING CIRCUMSTANCES, WRITE, "YES," IN THE SPACE AFTER ISSUE ONE AS WELL. IF YOU WRITE, "NO," IN ALL OF THE SPACES AFTER THE FOLLOWING AGGRAVATING CIRCUMSTANCES, WRITE,"NO," IN THE SPACE AFTER ISSUE ONE.

(1) Had Leroy McNeil been previously convicted of a felony involving the use of violence to the person?

ANSWER: YES

(2) Was this murder committed while Leroy McNeil was engaged in the commission of robbery with a firearm?

ANSWER: YES

ISSUE TWO:

Do you find from the evidence the existence of one or more of the following mitigating circumstances?

ANSWER: YES

BEFORE YOU ANSWER ISSUE TWO, CONSIDER EACH OF THE FOLLOWING MITIGATING CIRCUMSTANCES. YOU NEED NOT INDICATE ON THIS FORM WHICH MITIGATING CIRCUMSTANCES YOU DO OR DO NOT FIND.

IF YOU FIND ONE OR MORE OF THE MITIGATING CIRCUMSTANCES FROM THE EVIDENCE WRITE, "YES," IN THE SPACE AFTER ISSUE TWO, ABOVE. IF YOU DO NOT FIND ANY MITIGATING CIRCUMSTANCES, WRITE, "NO," IN THAT SPACE.

1. The defendant Leroy McNeil has no significant history of prior criminal activity.

2. The capacity of Leroy McNeil to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired.

3. That Leroy McNeil confessed to the crime and did so shortly after the crime was committed.

4. That Leroy McNeil has an I. Q. of 78 and is borderline mentally retarded.

5. The defendant Leroy McNeil had been a good and useful employee for Rea Construction Company prior to the events of April, 1983.

6. Any other circumstance or circumstances arising from the evidence which you the jury deem to have mitigating value.

ISSUE THREE:

Do you unanimously find beyond a reasonable doubt that the mitigating circumstance or circumstances found by you is, or are, insufficient to outweigh the aggravating circumstance or circumstances found by you?

ANSWER: YES

IF YOU ANSWER ISSUE THREE, "NO," INDICATE LIFE IMPRISONMENT UNDER"RECOMMENDATION AS TO PUNISHMENT." IF YOU ANSWER ISSUE THREE, "YES." PROCEED TO ISSUE FOUR.

ISSUE FOUR:

Do you unanimously find beyond a reasonable doubt that the aggravating circumstance or circumstances found by you is, or are, sufficiently sucstantial to call for the imoosition of the death penalty when considered with the mitigating circumstance or circumstances found by you?

ANSWER: YES

IF YOU ANSWER ISSUE FOUR, "NO," INDICATE LIFE IMPRISONMENT UNDER "RECOMMENDATION AS TO PUNISHMENT" ON THE LAST PAGE OF THIS FORM. IF YOU ANSWER ISSUE FOUR "YES," INDICATE DEATH UNDER "RECOMMENDATION AS TO PUNISHMENT."

RECOMMENDATION AS TO PUNISHMENT

INDICATE YOUR RECOMMENDATION AS TO PUNISHMENT BY WRITING"LIFE IMPRISONMENT" OR "DEATH," IN THE BLANK IN THE FOLLOWING SENTENCE:

We, the jury, unanimously recommend that the defendant, Leroy McNeil, be sentenced to DEATH. Exception No. 95

This the 14th day of MAY 1984.

Michael S. Hodges (signature)
Foreman of the Jury

APPENDIX F: TRIAL COURT'S PRE-ARGUMENT INSTRUCTIONS REGARDING PETITIONER'S ALLOCUTION

MR. GAMMON: No, Your Honor.

COURT: It's my understanding that it's the request of the defendant that he be permitted to participate in the final speeches to the jury and give a final speech to the jury, is that correct?

MR. GAMMON: Yes, Your Honor, that's correct.

COURT: Having given this considerable thought, it's the determination of the Court that the defendant is constitutionally entitled to that and that is allowed. However, the Court will require that the defendant's final speech to the jury be given prior to Mr. Stephens' speech.

MR. GAMMON: Thank you.

COURT: He can give the first one or his speech after your speech, Mr. Gammon.

MR. GAMMON: Thank you.

COURT: Gentlemen, any other matters before we begin the final arguments?

JURY RETURNS:

COURT: Ladies and gentlemen, the evidence has now been presented at the sentencing hearing. We will now begin the final speeches of the attorneys at the sentencing hearing. In their final speeches to you, the attorneys will present their contentions and their positions as to what the evidence in this case shows. Again, they will refer to certain aspects of the evidence in this case. However, again

PENGAD CO., BAYONNE, N.J. 07002 FORM 2004

your recollection of the evidence controls over that of the attorneys or mine. So if your recollection of the evidence differs from that of the attorneys, then you are to rely exclusively upon your own recollection of the evidence. The attorneys will also make reference to certain aspects of the law of the State of North Carolina as it applies in the sentencing hearing. Again, my instructions to you concerning the law controls over the representations as to the law made by the attorneys in their speeches to you, although I assure you none of the attorneys in this case will intentionally misrepresent any aspect of the law. At this stage of the proceeding, at a sentencing hearing, a defendant has a right, constitutional right to make a final speech to the jury. The defendant may in this case exercise that right. It's completely appropriate for him to do so. The final speech of the defendant will be given to you subject to these same rules and restrictions that the attorneys have in their final speech to you. He will present his contention and his position as to what the evidence in this case shows. I caution you, however, that the statement of the defendant, just as is true of the attorneys, is not evidence, and in making a statement to you the defendant is not testifying. He will not be sworn. He will not be subject to cross-examination. What he is doing, he is not giving testimony as a witness. He is simply making a final speech in the same

PENGAD CO., BAYONNE, N.J. 07002 FORM 7

way that the other attorneys in this case will do so. Therefore, you are not to consider the statements of the defendant as evidence in the case, but you are to consider it in the same contention and the same way that you would the other final speeches of the attorneys. All right, now the final speeches of the attorneys again are a very important part of this proceeding and I would invite your careful attention to their speeches. At this time the jury is with the defendant for final speeches.

most importantly because he has life, I ask you to spare him. I urge you to recommend life imprisonment instead of death. You have that immense power and decision to live or die, it's your decision. End the death in this case and end this case with life. Thank you.

COURT: Ladies and gentlemen, at this time we're going to recess for lunch. I'm going to ask that we take a shorter than usual recess for lunch today so that we can complete today all the things that we need to do today. With your consent we will recess until 2:00 o'clock. If you will please return to the seats that you now occupy at that time we will continue with the final speeches of the attorneys. Please continue to abide by all of the instructions that I have given you previously concerning your conduct as jurors.

RECESS.

COURT: Okay. Ladies and gentlemen, at this time the jury will be with the defendant Leroy McNeil for a final speech.

MR. McNEIL: Ladies and gentlemen of the jury, Mr. Stephens, Mr. Hobgood, and the Court, I won't take up too much of your time because I realize there's nothing that I can say or anyone here in this courtroom can say that would bring back the lives of those two girls, even my saying that I'm sorry is not going to bring them back. This thirteen or

PENCAD CO., BAYONNE, N.J. 07002 FORM 2004

fourteen months that I have been locked up or incarcerated has really brought a lot back to me. It made me realize that there's a lot that I have done, minor things and major things, that if I had to do them again now today I know that I would not do and I deeply say inside that I am sorry for what I have done and I wish there was some way that you all could take it under consideration and spare my life and give me a chance. I appreciate it.

COURT: Mr.Stephens, at this time the jury is with the State for a final speech.

ORIGINAL

Supreme Court, U.S.
FILED
MAY 19 1989
JOSEPH F. SPANIOL, JR.
CLERK

(3)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

NO. 88-7081

LEROY MCNEIL,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

BRIEF OF RESPONDENT STATE OF NORTH CAROLINA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

LACY H. THORNBURG
Attorney General

Ellen B. Scouten
Assistant Attorney General

N. C. Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602

Telephone: (919) 733-6012

COUNSEL OF RECORD FOR RESPONDENT

23 pp

NO. 88-7081

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

LEROY MCNEIL,	)	
	)	
Petitioner,	)	
	)	
v.	)	AFFIDAVIT OF MAILING
	)	
STATE OF NORTH CAROLINA	)	
	)	
Respondent.	)	

STATE OF NORTH CAROLINA
COUNTY OF WAKE

ELLEN B. SCOUTEN, being first duly sworn says:

1. I am an Assistant Attorney General for the State of North Carolina.

2. I am a member of the Bar of the Supreme Court of the United States.

3. On May 17, 1989 I personally placed the original and nine copies of the enclosed brief of respondent State of North Carolina in opposition to petition for writ of certiorari to the Supreme Court of the United States in an envelope properly addressed to the Clerk of this Court, with first class postage prepaid, and deposited the envelope in a mailbox belonging to the United States Postal Service within the City of Raleigh, North Carolina.

Ellen B. Scouten

Ellen B. Scouten
Assistant Attorney General

N. C. Department of Justice
P. O. Box 629
Raleigh, North Carolina 27602

Telephone: 919/733-6012

COUNSEL OF RECORD FOR RESPONDENT
STATE OF NORTH CAROLINA

Sworn to and subscribed before
me this 17th day of May, 1989.

Donna R. Douglas
Notary Public

My Commission Expires: 12-21-93

QUESTIONS PRESENTED

I. IS THE TRIAL COURT'S INSTRUCTION THAT IF THE JURY ANSWERED ISSUE FOUR "YES" THEN IT WOULD BE THE JURY'S DUTY TO RECOMMEND A SENTENCE OF DEATH A CONSTITUTIONALLY PERMISSIBLE GUIDANCE OF THE DECISION-MAKING PROCESS DESIGNED TO INSURE THAT THE JURY ADDRESSED AND FOLLOWED ALL STATUTORY REQUIREMENTS IN IMPOSING OR REJECTING THE DEATH PENALTY?

II. WHETHER THE ALLOCUTION WAS PROPERLY NOT SUBMITTED AS A FORMAL MITIGATING CIRCUMSTANCE SINCE IT WAS NOT EVIDENCE AND THE JURY WAS ALLOWED TO CONSIDER THE ALLOCUTION.

III. WHETHER MILLS V. MARYLAND AFFECTS THIS PETITIONER'S SENTENCING HEARING SINCE THE TRIAL COURT'S INSTRUCTIONS DID NOT REQUIRE PETITIONER'S JURORS TO FIND MITIGATING CIRCUMSTANCES UNANIMOUSLY.

TABLE OF CONTENTS

QUESTIONS PRESENTED.....i

TABLE OF CASES AND AUTHORITIES.....iii

CITATION TO OPINION BELOW.....1

JURISDICTION.....2

STATEMENT OF THE CASE.....2

I. Procedural History.....2

II. The Evidence at Trial.....3

REASONS WHY THE WRIT SHOULD NOT ISSUE.....7

ARGUMENT:

I. THE TRIAL COURT'S INSTRUCTION THAT IF THE JURY ANSWERED ISSUE FOUR "YES" THEN IT WOULD BE THE JURY'S DUTY TO RECOMMEND A SENTENCE OF DEATH IS A CONSTITUTIONALLY PERMISSIBLE GUIDANCE OF THE DECISION-MAKING PROCESS DESIGNED TO INSURE THAT THE JURY ADDRESSED AND FOLLOWED ALL STATUTORY REQUIREMENTS IN IMPOSING OR REJECTING THE DEATH PENALTY.....7

II. PETITIONER'S JURY WAS ALLOWED TO CONSIDER PETITIONER'S ALLOCUTORY STATEMENTS, AND THE COURT PROPERLY DID NOT SUBMIT THE CONTENTS OF THE ALLOCUTION AS A FORMAL MITIGATING CIRCUMSTANCE, SINCE THE ALLOCUTION WAS NOT EVIDENCE.....11

III. THE DECISION OF THIS COURT IN MILLS V. MARYLAND DOES NOT AFFECT THIS PETITIONER'S SENTENCING HEARING SINCE PETITIONER'S JURORS WERE NOT INSTRUCTED TO FIND MITIGATING CIRCUMSTANCES UNANIMOUSLY.....15

CONCLUSION.....17

TABLE OF CASES AND AUTHORITIES

Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).....11

Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976).....10

Lockett v. Ohio, 438 U.S. 586, 57 L.Ed.2d 973 (1978).....14

Mills v. Maryland, 486 U.S. ___, 100 L.Ed.2d 384 (1988).....15

Profitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).....10

State v. Kirkley, 308 N.C. 196, 302 S.E.2d 144 (1983).....15

State v. McDougall, 308 N.C. 1, 301 S.E.2d 308 (1983)..7

State v. McNeil, 324 N.C. 33, 375 S.E.2d 909 (1989)....3

State v. Pinch, 306 N.C. 1, 292 S.E.2d 203 (1982).....12

State v. Wilson, 322 N.C. 117, 367 S.E.2d 589 (1988)..12

State v. Zola, 112 N.J., 384, 548 A.2d 1022 (1988)....14

N.C. Gen. Stat. § 15A-2000(b).....12

N.C. Gen. Stat. § 15A-2000(c).....7

IN THE

SUPREME COURT OF THE JNITED STATES

OCTOBER TERM, 1988

NO. 88-7081

LEROY MCNEIL,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

BRIEF OF RESPONDENT STATE OF NORTH CAROLINA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Pursuant to the authority of Rule 22 and in the manner provided by Rules 33 and 34 of the Supreme Court Rules, the State of North Carolina responds to the petition of Leroy McNeil and requests that this Court deny the petition for writ of certiorari on the basis of the facts and authorities hereinafter set forth for the Court's consideration.

CITATION TO OPINION BELOW

Leroy McNeil was tried, and convicted on two counts of First-Degree Murder in Wake County Superior Court and given two sentences of Death. In an opinion reported in State of North Carolina v. Leroy McNeil, 324 N.C. 33, 375 S.E.2d 909 (1989), the Supreme Court of North Carolina found no error in the convictions, and affirmed the two judgments and two sentences of death.

JURISDICTION

Petitioner seeks to invoke jurisdiction of this Court under 28 U.S.C. § 1257(3). Respondent contends that the petition is not timely filed. The petition was filed on April 20, 1989, more than sixty (60) days after the Supreme Court of North Carolina rendered its opinion on February 9, 1989. The rules of this Court provide that the time for filing a Petition for Writ of Certiorari runs from the date the judgment sought to be reviewed is rendered, and not from the date of the issuance of the mandate. U.S. Sup.Ct. Rule 20.4.

STATEMENT OF THE CASE

I. Procedural History.

Defendant was tried at April 30, 1984, Criminal Session of Wake County Superior Court on Grand Jury Indictments charging First-Degree Murder of Elizabeth Faye Stallings on April 8, 1983, and First-Degree Murder of Deborah Fore on April 10, 1983, in Raleigh, Wake County, North Carolina. On May 9, 1984, the jury returned verdicts of Guilty of First-Degree Murder in both cases on the basis of premeditation and deliberation as well as felony murder. The trial court then conducted a sentencing hearing.

In the murder of Elizabeth Stallings the court submitted three possible aggravating circumstances, all three of which the jury found to be present: Defendant's conviction of a prior violent felony; the murder was committed during an armed robbery; and the murder was especially heinous, atrocious and cruel. In the murder of Deborah Jean Fore the court submitted the following aggravating circumstances: Defendant's conviction of a prior violent felony; the murder was committed during an armed robbery. The jury found both to be present.

On May 14, 1984, upon the jury's unanimous verdict that the defendant Leroy McNeil be sentenced to death in both cases, the court imposed a judgment of death in each case. The defendant gave Notice of Appeal to the Supreme Court of North Carolina on May 14, 1984. The Supreme Court of North Carolina found no error

in the guilt or sentencing phase of Petitioner's trial. State v. McNeil, 324 N.C. 33, 375 S.E.2d 909 (1989) in an opinion filed on February 9, 1989. Thereafter, Petitioner filed his Petition for Writ of Certiorari in this Court on April 24, 1989.

II. The Evidence at Trial.

On Friday, April 8, 1983, petitioner and his wife Penny were driving around Raleigh and drinking. Petitioner saw a young woman, whom neither of them knew, walking on the sidewalk. This was Elizabeth Faye Stallings, eighteen years old, unmarried, and a student at Wake Tech. Petitioner asked her did she want a ride, and after Penny told her it was okay, the woman got in the car with them. She told them she was going to the post office to purchase food stamps for her mother. Petitioner drove her there and told her he would wait for her. When she came back out and got in the car she accepted petitioner's invitation to have a beer and cocaine with them. Petitioner drove to a vacant house next door to his and Penny's residence on Alston Street. When they got inside the vacant house petitioner grabbed Elizabeth Faye Stallings around her neck and flipped his knife out. Petitioner forced her back in to the bedroom to the closet. He told her to give him the food stamps which petitioner then gave to Penny. He then made her pull up her top to see whether she had money in her bra. Petitioner then began choking Ms. Stallings with one hand while holding the knife in the other. Ms. Stallings was saying "Please, ya'll, don't hurt me." He told Penny to go next door and get his rifle, which she did. Petitioner told Penny to leave the room and when she did she heard a shot. Afterward, petitioner took the food stamps and sold them for $109.00. Petitioner also sold a ring he took from Ms. Stallings.

On Sunday, April 10, 1983, two days later, petitioner told Penny they had drunk up all the money and the rent was due the next day. Around eight or nine o'clock that night, petitioner and Penny went to the residence of Deborah Jean Fore, a woman who

petitioner knew but Penny did not. Deborah Jean Fore was twenty-three years old, graduated from St. Augustine's College in 1981, lived alone, and worked at the Department of Human Resources. Ms. Fore went with them to a store and then petitioner stopped the car on a deserted road, got his pistol from under the seat, put it in his belt and got out of the car. Ms. Fore got out of the car and went around to where petitioner was looking at a bad tire, at which time the petitioner shot her. After she fell, petitioner reached in her pocket and stole her keys and a dollar bill which was the only money she had. Petitioner tried to drag her body away from the road, but saw a car coming, and he jumped in his car and drove off. Petitioner went to Ms. Fore's apartment, used her key to get inside and stole her television set, her pocketbook and a set or rings. Petitioner then drove to a bank and attempted unsuccessfully to get cash with Ms. Fore's Teller II card. Later petitioner dropped Ms. Fore's purse into an abandoned well in his backyard and sold the pistol he used to kill Ms. Fore with and the rifle he shot Ms. Stallings with to a man named Bobby for $90.00.

Ms. Fore's body was found that night lying one to two feet off the paved road. Officers found no items of identification on the body and were not able to determine the identity of the dead woman that night.

On Monday, April 11, 1983, a pathologist, performed an autopsy on the body of Deborah Fore. He found a small hole in the left ear just behind the ear canal, with an abrasion ring around it, indicating an entrance bullet wound. He found stippling associated with a gunshot wound in the surrounding skin area. He found the bullet located on the right side of the lower part of the brain. The path of the bullet was horizontal and caused considerable hemorrhage and destruction of the brain tissue. The gunshot wound caused her death.

On Wednesday, April 13, 1983, Arthur Van Adams went to the vacant house on Alston Avenue next to the McNeil residence

because he was looking for a house to rent. When Mr. Adams went inside he discovered the nude, dead body of Elizabeth Faye Stallings lying on the floor, half inside and half outside a closet. There was a large amount of blood around the body, and a large amount of blood on the floor and spattered on the walls. There was feces directly under the left leg of the victim. This feces had dried, causing the leg to stick to the floor. Two pieces of a broken window frame were lying five or six feet from the victim. Latent fingerprint impressions were found on these pieces of wood. There were nails sticking out of these broken pieces of wood. Palm prints were found on the door frame, one of them in blood. The victim's clothes were lying in a pile on the floor.

On April 14, 1983 Dr. Gordon LeGrand performed an autopsy on the body of Elizabeth Faye Stallings. He found a stab wound in the lower left chest. This wound was three and one-half inches deep and penetrated the left side of the diaphragm, the left lobe of the liver, the stomach wall, stomach cavity and stopped at the back surface of the stomach. About a half pint of blood was in the parietal cavity. In Dr. LeGrand's opinion, because of the blood in the cavity, this wound occurred before death. Because of the nerves in the area, this would have caused the victim pain, but not unconsciousness. Dr. LeGrand found an inch long abrasion on the left chest. On the palm surface of the third finger of the left hand was a wound penetrating the skin down to the bone. On the back side of the left forearm there was an abrasion one and one-half inches long. On the back surface of the left shoulder was a bruise approximately three inches long and one inch wide. On the face above the left eyebrow in the middle of the left side of the forehead there was a swollen bruised and contused area. Below the left eye was a long thin scratch. These abrasions to the face were pre-mortem. The abrasion above the eye could have been caused by a blunt object. The one below the eye could have been caused by a narrow pointed

object such as a nail or a pick, and could have been made by the broken pieces of wooden window frame. There was a second wound to the liver in addition to the stab wound. The second wound was a bruising and could have been caused by blunt trauma such as a foot. This wound was pre-mortem. Dr. LeGrand also found abrasions over the right buttock and the sacrum. There was a bullet wound beside the right eye. The bullet had penetrated the skull through the right temple, causing swelling of the brain and death.

In examining the rectal area of the victim, Dr. LeGrand found fecal material around the anal orifice. Such material is often present in people in the agonal phase just prior to death where there has been a struggle. In examining the sexual organs of the victim, Dr. LeGrand found feces in the cavity of the vagina beyond the labia, an unnatural location for feces. In Dr. LeGrand's opinion it would take some sort of probing force to insert feces into the vagina. He found this material inserted approximately halfway up the victim's vagina. It would take more pressure than dragging to insert this material this far into the vagina.

Officers subsequently compared the latent palm prints and fingerprints with inked impressions of Leroy McNeil and found the palm prints on the door to be the left and right palm prints of Leroy McNeil, and the latent prints from the wood pieces to be the right index finger and the right ring finger of Leroy McNeil.

On April 23, 1982, petitioner asked to talk to officers. Petitioner then confessed to both the Stallings and the Fore murders.

The petitioner presented no evidence at the guilt phase of the trial.

At the sentencing phase, the State presented evidence that on July 10, 1976, in Mecklenburg County, petitioner unlawfully killed his wife, Cynthia Latham McNeil and that on May 16, 1977 petitioner pleaded guilty to the Felony of Voluntary Manslaughter

of Cynthia Latham McNeil and received a term of not less than eight nor more than ten years in prison.

At the sentencing hearing petitioner called Dr. Selwyn Rose, who is a lawyer and a forensic psychiatrist, practicing in Winston-Salem, North Carolina. Dr. Rose testified that he examined and tested the petitioner and found no evidence of insanity, psychosis, or severe mental illness, nor organic brain damage. In Dr. Rose's opinion petitioner has a chronic, severe, alcohol problem. This opinion is based solely on what Leroy McNeil told Dr. Rose and McNeil's statements to police. McNeil related to Dr. Rose that he spent most of his salary on drinking and was broke by the end of each weekend as a result.

Dr. Rose testified on cross-examination that he agreed with the conclusion of the psychiatrist who examined petitioner in 1983 that Leroy McNeil had nonconformist and defiant attitudes, narcissistic tendencies and low tolerance for frustration, as well as doubts about his masculinity. Petitioner's employer testified that petitioner was a hard and willing worker, very capable with machinery and got along well with fellow employees, but had attendance problems especially the day after payday. Petitioner was never drinking or drunk on the job.

REASONS WHY THE WRIT SHOULD NOT ISSUE

I. THE TRIAL COURT'S INSTRUCTION THAT IF THE JURY ANSWERED ISSUE FOUR "YES" THEN IT WOULD BE THE JURY'S DUTY TO RECOMMEND A SENTENCE OF DEATH IS A CONSTITUTIONALLY PERMISSIBLE GUIDANCE OF THE DECISION-MAKING PROCESS DESIGNED TO INSURE THAT THE JURY ADDRESSED AND FOLLOWED ALL STATUTORY REQUIREMENTS IN IMPOSING OR REJECTING THE DEATH PENALTY.

The North Carolina death penalty statute, G.S. § 15A-2000(c), provides that before a jury is permitted to return a verdict of death it must unanimously answer yes to four issues submitted to it at the conclusion of the sentencing phase in form of special verdicts. State v. McDougall, 308 N.C. 1, 301 S.E.2d

308 (1983). These four issues were submitted to the jury in the instant case as follows:

> ISSUE ONE:
>
> Do you unanimously find from the evidence beyond a reasonable doubt, the existence of one or more of the following aggravating circumstances?
>
> ISSUE TWO:
>
> Do you find from the evidence the existence of one or more of the following mitigating circumstances?
>
> ISSUE THREE:
>
> Do you unanimously find beyond a reasonable doubt that the mitigating circumstance or circumstances found by you is, or are, insufficient to outweigh the aggravating circumstance or circumstances found by you?
>
> ISSUE FOUR:
>
> Do you unanimously find beyond a reasonable doubt that the aggravating circumstance or circumstances found by you is, or are, sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstance or circumstances found by you?[1]

Following these four questions there is then a space on the verdict form for the jury to make its recommendation as to punishment.

In this case the court instructed the jury in connection with Issues Three and Four as in part, as follows:

> In each case if you unanimously find beyond a reasonable doubt the mitigating circumstances found by you in that particular case are insufficient to outweigh the aggravating circumstances found by you in that particular case, you would answer Issue Three "Yes" in that case. If you do not so find or have a reasonable doubt as to whether they do, you would answer Issue Three "No" in that case. If you answer Issue Three "No" in any case, in either of the two cases, as to that case, it will be your duty to recommend that the petitioner be sentenced to life imprisonment. If you answer Issue Three "Yes" in a particular case, then it will be your responsibility to consider Issue Four in that particular case.
>
> Issue Four reads as follows: Do you unanimously find beyond a reasonable doubt

---

[1] A copy of the Issues and Recommendation as to Punishment form in each case is contained in Appendix E to the Petition.

that the aggravating circumstance or circumstances found by you is, or are, sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstance or circumstances found by you?

If you reach Issue Four in either or both cases, you should consider it separately as to the Stallings case and as to the Fore case. In deciding this issue, you are not to consider the aggravating circumstances standing alone. You must consider them in connection with any mitigating circumstances found by you in a particular case. After considering the totality of the aggravating and mitigating circumstances, you must be convinced beyond a reasonable doubt that the imposition of the death penalty is justified and appropriate in that case before you can answer the issue "Yes." In doing so, you are not applying a mathematical formula. For example, three circumstances of one kind do not automatically and of necessity outweigh one circumstance of another kind. The number of circumstances found is only one consideration in determining which circumstances outweigh others. You may very properly emphasize one circumstance more than another in a particular case. You must consider the relative substantiality and persuasiveness of the existing aggravating and mitigating circumstances in making this determination. You, the jury, must determine how compelling and persuasive the totality of the aggravating circumstances are when compared with the totality of the mitigating circumstances found by you. After so doing, if you are satisfied beyond a reasonable doubt that the aggravating circumstances found by you are sufficiently substantial to call for the death penalty, then it would be your duty to answer that issue "Yes" in that particular case. If you are not so satisfied or have a reasonable doubt, then it would be your duty to answer the answer "No" in that particular case.

In the event that you do not find existence of any mitigating circumstances, you must still answer this issue. In such case, you must determine whether the aggravating circumstances found by you are of such value, weight, importance, consequence, or significance as to be sufficiently substantial to call for the imposition of the death penalty. Substantial circumstances may be contrasted with circumstances that are enuous, flimsy, abstract, imaginary, deceptive or negligible.

Substantial means having substance or weight, important, significant or momentous. Aggravating circumstances may exist in a particular case and still not be sufficiently substantial to call for the death penalty. Therefore, it is not enough for the state to prove from the evidence beyond a reasonable doubt the existence of one or more

> aggravating circumstances. It must also prove beyond a reasonable doubt that such aggravating circumstances are sufficiently substantial to call for the death penalty, and before you may answer Issue 4 "Yes" in either case, you must agree unanimously that they are.
>
> If you answer Issue Four "No" in a particular case, you must recommend that this petitioner be sentenced to life imprisonment. If you answer Issue Four "Yes" in a particular case, it would be your duty to recommend that the petitioner be sentenced to death in that particular case.[2]

Petitioner contends this instruction creates a mandatory capital sentencing process in violation of the Eighth Amendment requirement of individualized punishment. The State of North Carolina responds that the instructions insure guided discretion in making the statutory findings required for a recommendation of death, and keep the jury from exercising unbridled discretion to return a sentencing verdict which was inconsistent with the findings it made pursuant to the statutory scheme.

The sentencing function of the jury in a capital case is a grave responsibility. In a constitutionally acceptable statutory scheme, both the State and the petitioner are entitled to a sentence recommendation that is based solely on the facts of the case and the law. Given those facts and the applicable law, the jury must use its limited and guided discretion in fashioning a sentence recommendation, and must act within those guidelines and limits. The jury may not disregard the limitations imposed on it by statute. The jury has no more right arbitrarily to impose a life sentence than it does arbitrarily to impose a death sentence since in either case it would mean the jury has disregarded the very thing which makes the sentencing structure constitutional: limits on the jury's unbridled discretion. See Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976); Profitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976);and

---

[2] The complete text of the instructions is contained in Appendix F to the Petition. The quoted portion is at pages 467-470.

Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

These United States Supreme Court cases make clear that a state's statutory system in capital cases must be one which, while allowing discretion in imposing the sentence, appropriately guides and limits jury discretion in the imposition of such sentences.

The North Carolina death penalty scheme allows the jury to appraise the evidence and reason whether or not the death penalty is appropriate in the case during their consideration of the fourth issue. Once they do this and decide the fourth issue "Yes" they then have the duty to fill in the space on the verdict sheet stating that they unanimously recommend the death penalty, otherwise they would be acting capriciously and contrary to law. There is no constitutional flaw in this requirement.

II. PETITIONER'S JURY WAS ALLOWED TO CONSIDER PETITIONER'S ALLOCUTORY STATEMENTS, AND THE COURT PROPERLY DID NOT SUBMIT THE CONTENTS OF THE ALLOCUTION AS A FORMAL MITIGATING CIRCUMSTANCE, SINCE THE ALLOCUTION WAS NOT EVIDENCE.

Petitioner complains that the trial court and the North Carolina Supreme Court violated his Eighth Amendment rights in precluding the jury from considering as a mitigating factor an aspect of petitioner's character proffered as a basis for a sentence less than death, by ruling that the petitioner's allocution could not be submitted to the jury as evidence of the mitigating circumstance of remorse. The State responds that the Court did not preclude the jury from considering petitioner's allocution as a mitigating factor, but it properly refused to submit remorse as a formal, written mitigating circumstance to the jury since there was no evidence of remorse.

At trial the petitioner requested, through counsel, that he be permitted to participate in the final speeches to the jury and give a final speech to the jury. The trial court granted the petitioner's request. Petitioner made the following statement to the jury:

> I won't take up too much of your time because I realize there's nothing that I can say or anyone here in this courtroom can say that would bring back the lives of those two girls, even my saying that I'm sorry is not going to bring them back. This 13 or 14 months that I have been locked up or incarcerated has really brought a lot back to me. It made me realize that there's a lot that I have done, minor things and major things, that if I had to do them again now today I know that I would not do and I deeply say inside that I am sorry for what I have done and I wish there was some way that you all could take it under consideration and spare my life and give me a chance.

The trial court specifically instructed the jury to consider this statement, but he also instructed them that it was not evidence. Although the trial court denominated petitioner's statement as a final speech, the statement was actually an allocution.

Petitioner's attorney made no request that the sentiments expressed in his allocution be submitted to the jury in written form as a mitigating circumstance. The North Carolina Supreme Court has ruled that a petitioner has the duty to bring to the court's attention evidence of the existence of a mitigating circumstance, otherwise the judge has no duty to instruct on it. State v. Pinch, 306 N.C. 1, 292 S.E.2d 203 (1982), State v. Wilson, 322 N.C. 117, 367 S.E.2d 589 (1988). In this case not only did the petitioner's attorney fail to request that the allocution be submitted as a written mitigating circumstance, but the petitioner had no right to have the allocution submitted as a written mitigating circumstance since the allocution was not evidence. Under North Carolina law the trial court is required to instruct the jury only on the basis of actual evidence offered and received in open court. North Carolina General Statute § 15A-2000(b) provides in part:

> b. Sentence Recommendation by the Jury.-Instructions determined by the trial judge to be warranted by the evidence shall be given by the court in its charge to the jury prior to its deliberation in determining sentence. In all cases in which the death penalty may be authorized, the judge shall include in his instructions to the jury that it must consider any aggravating circumstance or circumstances or mitigating circumstance

> or circumstances from the lists provided in subsections (e) and (f) which may be supported by the evidence, and shall furnish to the jury a written list of issues relating to such aggravating or mitigating circumstance or circumstances. (emphasis added)

Although allocution is not argument, it still is not evidence, and may not be treated as such since it is unsworn testimony not subject to cross-examination. Since Leroy McNeil's purported remorse was not presented in the form of evidence, the judge had no duty to list it as a possible mitigating circumstance on the verdict sheet.

Allocution is a vestige of the common law; it is not included in North Carolina's capital punishment statute, nor allowed by court rule as it is in Maryland or by statute as it is in Virginia. Despite the fact that the statute and rules do not provide for it, the trial court in this case allowed Leroy McNeil to make an allocution. He gained a substantial benefit thereby. He was able to get his message before the jury; he was able to make a personal plea for mercy to the jury; he was not subject to cross-examination; he was not under oath so could fabricate as he wished; and he was free to bring up matters not in evidence which his counsel could not do in their closing arguments.

It would be unjust to allow petitioner to obtain the further benefit of his allocution as evidence, since it is not made under oath and not subject to cross-examination. The petitioner is entitled to use the Fifth Amendment as a shield, but he may not use it as a sword to secure the treatment of unsworn, uncross-examined testimony as a evidence. Since petitioner benefitted so amply from being allowed to allocute, and since allocution may not be treated as evidence, the trial court did not prejudice him by failing to submit remorse as a formal mitigating circumstance. Petitioner had the right to present evidence of remorse, and could have testified to his remorse under oath. Since there was no evidence to support remorse as a

mitigating circumstance, the trial court was correct in not submitting it.

It is well settled that the jury may not be precluded from taking into consideration the mitigating circumstances the petitioner proffers. Lockett v. Ohio, 438 U.S. 586, 57 L.Ed.2d 973 (1978). However, this does not impose a requirement that every possible mitigating circumstance be submitted in writing to the jury. State v. McDougall, 308 N.C. 1, 301 S.E.2d 308 (1983).

Allocution has a limited role. The purpose of allocution is to allow the petitioner to make a personal plea to the sentencer to spare his life. State v. Zola, 112 N.J., 384, 548 A.2d 1022 (1988). It cannot be used as a vehicle to introduce evidence which would require submission of a written mitigating circumstance, because it is not under oath and not subject to cross-examination and therefore is not reliable. To preserve the integrity of the sentencing process, only sworn, cross-examined testimony can be the basis for formal submission of a mitigating circumstance.

There is no basis for petitioner's contention that there is agreement of authorities that "Lockett and its progeny require that a capital petitioner be given the opportunity to allocute, that it be unencumbered, and that the jury be told to consider it." (Petition, p 10)

In this case Leroy McNeil was given the opportunity to allocute, his allocution was unencumbered, and the jury was told to consider it. The essence of petitioner's complaint is that the jury was not told to consider the allocution as a basis for a formal mitigating circumstance. All that Lockett requires is that mitigation not be kept from the jury. Since petitioner's allocution was not kept from the jury he has nothing of which to complain, and there has been no constitutional violation.

III. THE DECISION OF THIS COURT IN MILLS V. MARYLAND DOES NOT AFFECT THIS PETITIONER'S SENTENCING HEARING SINCE PETITIONER'S JURORS WERE NOT INSTRUCTED TO FIND MITIGATING CIRCUMSTANCES UNANIMOUSLY.

Petitioner contends the procedure followed in his case expressly forbade the jury to consider mitigating evidence unless all twelve jurors unanimously found the existence of a mitigating circumstance relating to that evidence. He contends this procedure violates Mills v. Maryland, 486 U.S. ___, 100 L.Ed.2d 384 (1988). The State responds that not only does Mills v. Maryland not affect North Carolina's capital sentencing scheme, but Mills has no application to this case, since petitioner's jurors were not instructed to find mitigating circumstances unanimously.

Although the Supreme Court of North Carolina in State v. Kirkley, 308 N.C. 196, 302 S.E.2d 144 (1983), found no error in an instruction that the jury must be unanimous in finding that a mitigating circumstance exists, the trial court did not choose to give that instruction to the jury in petitioner's case. The trial judge instructed the jury that their verdict must be unanimous on every issue except Issue Two, which was the finding of mitigating circumstances.

The written forms entitled "Issues and Recommendations as to Punishment" in each case reveal that the word "unanimously" appears in Issues One, Three, and Four, but not in Issue Two. The issues on the forms for each separate murder are as follows:

> ISSUE ONE:
>
> Do you unanimously find from the evidence beyond a reasonable doubt the existence of one or more of the following aggravating circumstances.
>
> ISSUE TWO:
>
> Do you find from the evidence the existence of one or more of the following mitigating circumstances.
>
> ISSUE THREE:
>
> Do you unanimously find beyond a reasonable doubt that the mitigating circumstance or circumstances found by you is, or are,

> insufficient to outweigh the aggravating circumstance or circumstances found by you?
>
> ISSUE FOUR:
>
> Do you unanimously find beyond a reasonable doubt that the aggravating circumstance or circumstances found by you is, or are, sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstance or circumstances found by you?[3]

(emphasis added)

The language on the Maryland form which caused the constitutional problem, according to Mills, is as follows:

> SECTION 2 Based upon the evidence, we unanimously find that each of the following mitigating circumstances which is marked "Yes" has been proven to exist by a preponderance of the evidence and each mitigating circumstance marked "no" has not been proven by a preponderance of the evidence.

Mills v. Maryland, supra, appendix to opinion. (emphasis added)

In Leroy McNeil's case, neither the instructions nor the verdict form required the jury to find mitigating circumstances unanimously as did the Maryland form struck down by this court.

Petitioner has cited no portion of the instructions or the verdict sheet which would lead a reasonable juror to conclude that no piece of mitigating evidence proffered by McNeil could be considered in his favor in the sentencing decision unless it was first found by all twelve jurors to make out a mitigating circumstance, as he alleges.

The instructions made no such statement, and the verdict sheet which the jurors had full access to in the jury room, expressly omitted the word "unanimously" from the second issue - consideration of the mitigating circumstances.

This petitioner could not have suffered the prejudice found in Mills. There is no Mills issue in this case, and no basis for granting certiorari.

---

[3] A copy of the Issues and Recommendation as to Punishment in each case is included in Appendix E to the Petition.

CONCLUSION

There is no issue of constitutional magnitude presented by this case. North Carolina's capital sentencing statute is constitutional. It narrows the class of death-eligible murders and provides for consideration of mitigation and exercise of discretion. The statute was applied in this case in compliance with the Constitution. For the reasons and authorities set forth herein, the State of North Carolina respectfully submits that the Petition for Writ of Certiorari be denied.

This the 17 day of May 1989.

LACY H. THORNBURG
Attorney General

Ellen B. Scouten
Assistant Attorney General

N. C. Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602
Telephone: (919) 733-6012

ATTORNEYS OF RECORD FOR RESPONDENT
STATE OF NORTH CAROLINA

NO. 88-7081

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

LEROY MCNEIL,	)
	)
Petitioner,	)
	)
v.	)
	)
STATE OF NORTH CAROLINA	)
	)
Respondent.	)

CERTIFICATE OF SERVICE

I, Ellen B. Scouten, Assistant Attorney General, do hereby certify that I am a member of the Bar of the Supreme Court of the United States and that I have on this date served a copy of the foregoing Brief of Respondent State of North Carolina in Opposition to Petition for Writ of Certiorari upon the Attorney of Record for Petitioner Leroy McNeil by depositing same in the United States mail, first class postage prepaid, and properly addressed as follows:

Gordon Widenhouse
Assistant Appellate Defender
Post Office Box 1070
Raleigh, North Carolina 27602

This the 17 day of May, 1989.

LACY H. THORNBURG
Attorney General

Ellen B. Scouten
Assistant Attorney General

N. C. Department of Justice
P. O. Box 629
Raleigh, North Carolina 27602

Telephone: 919/733-6012

COUNSEL OF RECORD FOR RESPONDENT
STATE OF NORTH CAROLINA

SUPREME COURT OF THE UNITED STATES

LEROY McNEIL *v.* NORTH CAROLINA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

No. 88-7081. Decided March 26, 1990

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the Supreme Court of North Carolina for further consideration in light of *McKoy* v. *North Carolina*, 494 U. S. —— (1990).

JUSTICE KENNEDY, with whom THE CHIEF JUSTICE, JUSTICE O'CONNOR, and JUSTICE SCALIA join, dissenting.

The Court adopts what may be perceived as a prudent course by granting certiorari in this case, vacating the decision of the North Carolina Supreme Court, and remanding for consideration in light of our decision in *McKoy* v. *North Carolina*, 494 U. S. —— (1990). It is true that petitioner was sentenced prior to our decision in *McKoy*, and that the North Carolina Supreme Court rejected his challenge to the sentence on the basis of its decision in *State* v. *McKoy*, 323 N. C. 1, 372 S. E. 2d 12 (1988). In the particular circumstances of this case, however, there is no basis upon which we should disturb the judgment.

The record shows that the unanimity instruction held unconstitutional in *McKoy* was *not* given in petitioner's trial. Neither did the verdict form given to the jurors contain any unanimity requirement as to mitigating circumstances. The form, reproduced as Appendix E to the petition for certiorari, required unanimity as to the presence of aggravating factors (issue 1) and as to the result of the weighing stages of the statute (issues 3 and 4), but not as to presence of mitigating factors (issue 2). Given the express unanimity requirement as to issues 1, 3, and 4, but the omission of any such

requirement as to issue 2 on the verdict form, no reasonable juror would have interpreted the form or the instructions to require unanimity as to mitigating factors.

On remand, the North Carolina Supreme Court remains free to consider these facts, or any others that may affect the determination whether our opinion in *McKoy* requires alteration of its judgment. Similarly, in cases where there is a question of procedural default, *e. g.*, *Artis* v. *North Carolina*, 494 U. S. —— (1990) (No. 89–6526), or where a unanimity requirement may have been harmless due to failure to present mitigating evidence, *e. g.*, *Hunt* v. *North Carolina*, 494 U. S. —— (1990) (No. 88–6684); *Laws* v. *North Carolina*, 494 U. S. —— (1990) (No. 89–5837), these issues remain open for examination on remand. Because it is in my view clear, however, that no unanimity requirement was involved in this case, I would deny the petition for certiorari.